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Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties

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I. Introduction

1. In 2012, the International Law Commission placed the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" on its current programme of work.[1] That topic originated from previous work of the Commission's Study Group on Treaties over Time.[2]

2. During its sixty-fifth session in 2013, the Commission considered the first report on the topic and provisionally adopted five draft conclusions with commentaries.[3] States generally reacted favourably to the work during the debate in the Sixth Committee on the report of the Commission on its sixty-fifth session.[4]

3. During its sixty-sixth session in 2014, the Commission considered the second report on the topic and provisionally adopted five additional draft conclusions with commentaries.[5] During the debate in the Sixth Committee in 2014 delegations generally welcomed the adoption of the five draft conclusions and considered them to be balanced and in line with the overall objective of the work on the topic.[6]

4. During its sixty-seventh session in 2015, the Commission considered the third report on the topic and provisionally adopted draft conclusion 11 with commentaries.[7] In the course of the debate on the work in the Sixth Committee in 2015, delegations generally welcomed the adoption of draft conclusion 11.[8] Some

[1] *International Law Commission, Report of the Sixty-fourth session (2012), Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), Chapter X, p. 121.

[2] *International Law Commission, Report of the Sixtieth session (2008), Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), annex A, pp. 365-389; *International Law Commission, Report of the Sixty-first session (2009), Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), Chapter XII, pp. 353-355; *International Law Commission, Report of the Sixty-second session (2010), Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), Chapter X, pp. 334-335; *International Law Commission, Report of the Sixty-third session (2011), Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), Chapter XI, pp. 279-284.

[3] *International Law Commission, Report of the Sixty-fifth session (2013), Official Records of the General Assembly, Sixty-eight Session, Supplement No. 10* (A/68/10), Chapter IV, p. 11.

[4] *General Assembly, Report of the International Law Commission on the work of its Sixty-fifth session*, Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session (A/CN.4/666), p. 3.

[5] *International Law Commission, Report of the Sixty-sixth session (2014), Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), Chapter VII, p. 168.

[6] *General Assembly, Report of the International Law Commission on the work of its Sixty-sixth session*, Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session (A/CN.4/678), p. 8.

[7] *International Law Commission, Report of the Sixty-seventh session (2015), Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), Chapter VIII, p. 189.

[8] See A/C.6/70/SR.20 to A/C.6/70/SR.23, statements by Austria (A/C.6/70/SR.20, para. 34), Australia (A/C.6/70/SR.22, para. 52), Belarus (A/C.6/70/SR.21, para. 34), Chile (A/C.6/70/SR.22, para. 87); the Czech Republic (A/C.6/70/SR.20, para. 69), El Salvador (A/C.6/70/SR.22, para. 106), the European Union (A/C.6/70/SR.19, para. 87), Germany (A/C.6/70/SR.22, para. 16), Greece (A/C.6/70/SR.20, para. 52), Iran (Islamic Republic of) (A/C.6/70/SR.23, para. 68), Italy (A/C.6/70/SR.22, para. 113), Jamaica (A/C.6/70/SR.22, para. 23), Malaysia (A/C.6/70/SR.23, para. 43), the Netherlands (A/C.6/70/SR.21, para. 44), New Zealand (A/C.6/70/SR.22, para. 33), Poland (A/C.6/70/SR.21, para. 60), Portugal (A/C.6/70/SR.22, para. 62), the Republic of Korea (A/C.6/70/SR.23, para. 58), Romania (A/C.6/70/SR.21, para. 80), the Russian Federation (A/C.6/70/SR.23, para. 22), Singapore (A/C.6/70/SR.21, para. 60), Spain (A/C.6/70/SR.22, para. 96), Sweden (on behalf of the

States considered that the distinction between paragraphs 2 and 3 of draft conclusion 11 should be formulated more clearly.[9] Other States expressed the view that the relationship between an "established practice of the organization" and the subsequent practice of international organizations generally should have been elaborated upon.[10] Some States specifically agreed with the possibility that the practice of an organization might contribute to the identification of the object and purpose of a constituent treaty, while others called that position into question.[11] It was suggested that the difference between the practice of States acting as such and as members of a plenary organ of an international organization should be emphasized.[12] It was also pointed out that the distinction between subsequent practice that establishes the agreement of the parties and such practice that does not should be observed.[13]

5. Some delegations would have preferred to see more examples of cases envisaged by paragraph 4 of draft conclusion 11.[14] The European Union in particular proposed to have its practice covered more specifically in the commentary, as Jamaica did with regard to the case law of the Caribbean Court of Justice.[15] Different positions were voiced with regard to the question of whether a constituent treaty of an international organization could be modified as a result of subsequent practice, a question with regard to which the draft conclusion does not take a position.[16]

6. Some States proposed that the Commission modify draft conclusions 1 (4) and 4 (3) in order to take account of the practice of international organizations as a form of "other subsequent practice".[17] It was also proposed to include a draft conclusion regarding treaties adopted within an international organization.[18]

Nordic countries) (A/C.6/70/SR.20, para. 8), the United Kingdom of Great Britain and Northern Ireland (A/C.6/70/SR.23, para. 33) and the United States of America (A/C.6/70/SR.22, paras. 42 and 43), with certain reservations regarding paragraph 3); see generally *General Assembly, Report of the International Law Commission on the work of its Sixty-seventh session*, Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventieth session (A/CN.4/689), paras. 38-51.

[9] Australia (A/C.6/70/SR.22, para. 54), the Czech Republic (A/C.6/70/SR.20, paras. 61 and 62), Italy (A/C.6/70/SR.22, para. 114), Romania (A/C.6/70/SR.21, para. 80), the Russian Federation (A/C.6/70/SR.23, para. 22) and Spain (A/C.6/70/SR.22, para. 98); the Netherlands, however, pointed out that it is often difficult to distinguish between the practice of the organization and that of States, regardless of the formulation (A/C.6/70/SR.21, para. 45).

[10] Austria (A/C.6/70/SR.20, para. 36), Belarus (A/C.6/70/SR.21, para. 34), El Salvador (A/C.6/70/SR.22, para. 106), Greece (A/C.6/70/SR.20, para. 54), Italy (A/C.6/70/SR.22, para. 115) and Portugal (A/C.6/70/SR.22, para. 62).

[11] Germany (A/C.6/70/SR.22, para. 16), Greece (A/C.6/70/SR.20, para. 53) and Romania (A/C.6/70/SR.21, para. 80); but see the Russian Federation (A/C.6/70/SR.23, para. 22) and the United States (A/C.6/70/SR.22, para. 44).

[12] Belarus (A/C.6/70/SR.21, para. 34) and Republic of Korea A/C.6/70/SR.23, para. 59).

[13] Iran (Islamic Republic of) (A/C.6/70/SR.23, para. 68).

[14] Czech Republic (A/C.6/70/SR.20, para. 60), Germany (A/C.6/70/SR.22, para. 16) and Portugal (A/C.6/70/SR.22, para. 62); see also Italy (A/C.6/70/SR.22, para. 115).

[15] European Union (A/C.6/70/SR.19, paras. 87-89); in this sense, see also Germany (A/C.6/70/SR.22, para. 16) and Jamaica (A/C.6/70/SR.22, paras. 24-26).

[16] Netherlands (A/C.6/70/SR.21, para. 45), Chile (A/C.6/70/SR.22, para. 87), Malaysia (A/C.6/70/SR.23, para. 49), New Zealand (A/C.6/70/SR.22, para. 33) and Singapore (A/C.6/70/SR.21, para. 60).

[17] Austria (A/C.6/70/SR.20, para. 38) and Malaysia (A/C.6/70/SR.23, para. 51).

[18] El Salvador (A/C.6/70/SR.22, para. 107) and Malaysia (A/C.6/70/SR.23, para. 50).

7. At its 2015 session, the Commission requested that, by 31 January 2016, States and international organizations provide it with:

(a) Any examples of decisions of national courts in which a subsequent agreement or subsequent practice has contributed to the interpretation of a treaty;

(b) Any examples in which pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty.[19]

8. As at the date of submitting the present report, responses have been received from eight States.[20] Further contributions are welcome at any time.

9. The first two reports on subsequent agreements and subsequent practice in relation to the interpretation of treaties considered general aspects of the topic (A/CN.4/660 and A/CN.4/671). The third report addressed the role of subsequent agreements and subsequent practice in relation to the interpretation of constituent instruments of international organizations (A/CN.4/683). The present report concerns the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert bodies and of decisions of domestic courts.[21]

II. Pronouncements of expert bodies

10. Treaties are applied in various ways. They are applied, first and foremost, by the States parties themselves, including by their courts. In many cases, international organizations contribute to the application of treaties, in particular to the application of their own constituent instruments.[22] There are also treaties which establish bodies that have the task of monitoring or contributing in other ways to the application of such treaties, including bodies consisting of experts who serve in their individual capacity (see item 1). Treaty bodies consisting of such experts adopt pronouncements (see item 2) as a form of practice which contributes to the application of the treaty and which may be relevant for the purpose of interpretation of the treaty (see item 3). The best-known expert bodies are those established under human rights treaties (see item 4). But there are also other such bodies (see item 5).

[19] *International Law Commission, Report of the Sixty-seventh session (2015), supra* note 7, Chapter III, p. 15.

[20] By 7 March 2016, Australia, the Czech Republic, Germany, Paraguay, Spain and the International Labour Organization (ILO) had submitted information in writing (available on the website of the International Law Commission at the following address: http://legal.un.org/ilc/guide/1_11.shtml#top). Singapore (A/C.6/70/SR.21, para. 62), Sweden, (on behalf of the Nordic countries) (A/C.6/70/SR.20, para. 8) and the United States (A/C.6/70/SR.22, para. 46) made comments in response to the request in their statements to the Sixth Committee in 2015.

[21] During the debate in the Sixth Committee, Singapore (A/C.6/70/SR.21, para. 62), Sweden (on behalf of the Nordic countries) (A/C.6/70/SR.20, para. 8) and the United States (A/C.6/70/SR.22, para. 46) encouraged the Commission to deal with pronouncements of expert bodies.

[22] See draft conclusion 11, *International Law Commission, Report of the Sixty-seventh session (2015), supra* note 7.

1. Forms of expert bodies

11. Most bodies established by treaties either consist of States or are organs of international organizations. The output of a treaty body composed of State representatives, and which is not an organ of an international organization, is a form of practice by those States that thereby act collectively within its framework. That is true, in particular, for decisions of Conferences of States Parties, with respect to which the Commission has already provisionally adopted draft conclusion 10.[23] The output of a treaty body that is an organ of an international organization (and which may or may not consist of States) is, in the first place, attributed to the organization.[24] Such output may, however, under certain circumstances also be attributed, for the purpose of interpretation, to the States represented therein.[25]

12. The present report is neither concerned with treaty bodies that consist of States, nor with bodies that are organs of an international organization.[26] Rather, it deals with treaty bodies that consist of experts who serve in their individual capacity.[27] The best-known examples for such bodies are the committees established under various human rights treaties at the universal level (the International Convention on the Elimination of All Forms of Racial Discrimination,[28] the International Covenant on Civil and Political Rights,[29] the International Covenant

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[23] *International Law Commission, Report of the Sixty-sixth session (2014), supra* note 5, Chapter VII, pp. 170 and 205-217.

[24] Article 6 (1) of the Draft articles on responsibility of international organizations, *International Law Commission, Report of the Sixty-third session (2011), supra* note 2, Chapter V, p. 55; the Working Group on Arbitrary Detention is an example of a body of experts serving in their personal capacity that is mandated by the Human Rights Council under its resolution 24/7 of 26 September 2013, and therefore a subsidiary organ of the Council, see http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx (accessed 3 March 2016).

[25] See draft conclusion 12 [13] (Resolutions of international organizations and international conferences) of the draft conclusions on the identification of customary international law, provisionally adopted by the Drafting Committee (A/CN.4/869), 14 July 2015; see also *Europäische Schule München v. Silvana Oberto, Barbara O'Leary*, Judgment of the European Court of Justice in Joined Cases C-464/13 and C-465/13C on the effects of decisions of the Complaints Board under the Statute of the European Schools, at paras. 57-67.

[26] The Committee of Experts on the Application of Conventions and Recommendations of ILO is an important example of an expert body which is an organ of an international organization. It was established in 1926 to examine Government reports on ratified conventions. It is composed of 20 eminent jurists from different geographic regions, legal systems and cultures, who are appointed by the governing body of ILO for three-year terms, see http://www.ilo.org (accessed 3 March 2016), and information provided by ILO to the Commission, on the International Law Commission website at http://legal.un.org/ilc/guide/1_11.shtml.

[27] See, e.g., article 28 (3) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; the members of such bodies are often called "independent experts", see C. Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 3rd ed. 2014), p. 219; treaties do not, however, usually specify what the term "serving in their individual capacity" means apart from freedom from governmental instruction, which does not exclude that members have a formal connection with the Government that has nominated them.

[28] Articles 8-14 of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195.

[29] Articles 28-45, International Covenant on Civil and Political Rights.

on Economic, Social and Cultural Rights,[30] the Convention on the Elimination of All Forms of Discrimination against Women,[31] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[32] and others).[33] But there are also expert bodies under other treaties. Important examples include the Commission on the Limits of the Continental Shelf under the United Nations Convention on the Law of the Sea,[34] the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change,[35] the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),[36] and the International Narcotics Control Board under the Single Convention on Narcotic Drugs.[37] The members of such bodies are not necessarily lawyers but some treaties require that, as far as the composition is concerned, "consideration [is to be] given to the usefulness of the participation of some persons having legal experience".[38]

13. The pronouncements of such expert bodies[39] are not a form of State practice in the application of a treaty and those pronouncements are not usually attributed to an

[30] Articles 1-15 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (A/63/435), 10 December 2008 (adopted 10 December 2008, entered into force 5 May 2013); the Committee was originally established by the Economic and Social Council, resolution 1987/5, 26 May 1987 (see E/C.12/1989/4, 27, para. 9), to monitor compliance with International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[31] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

[32] Articles 17-24 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

[33] See N. Rodley, "The Role and Impact of Treaty Bodies", in D. Shelton, ed., *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), pp. 622-623.

[34] The Commission on the Limits of the Continental Shelf was established under article 76 (8) of the United Nations Convention on the Law of the Sea and annex II to the Convention, 1833 UNTS 3.

[35] The Compliance Committee under the Kyoto Protocol, 2303 UNTS 162, was established under article 18 of the Protocol and decision 24/CP.7, *Procedures and mechanisms relating to compliance under the Kyoto Protocol*, adopted by the Conference of the Parties serving as meeting of the Parties to the Kyoto Protocol (FCCC/CP/2001/13/Add.3).

[36] The Compliance Committee under the Aarhus Convention was established under article 15 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 2161 UNTS 447, and decision I/7, *Review of Compliance*, adopted at the first meeting of the Parties 2002 (ECE/MP.PP/2/Add.8).

[37] The International Narcotics Control Board was established under article 9 of the Single Convention on Narcotic Drugs, 520 UNTS 151.

[38] Articles 28 (2), International Covenant on Civil and Political Rights; 17 (1), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 26 (1), International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) (2716 UNTS 3); see also: section V, para. 3 of decision 24/CP.7, *supra* note 35; section I, para. 2 of decision I/7, *supra* note 36.

[39] Further relevant expert bodies include the Compliance Committee established under article 34 of the Cartagena Protocol on Biosafety (2226 UNTS 208) and decision BS-I/7 adopted at the First Meeting of the Conference of the Parties serving as Meeting of the Parties to the Cartagena Protocol on Biosafety.

international organization. Their possible significance, for the purpose of the interpretation of a treaty, is the subject of the present section of the present report.

2. "Pronouncements"

14. The official designation of the forms of action of expert bodies in treaties varies (e.g., "views",[40] "recommendations",[41] "comments",[42] "measures",[43] "consequences"[44]). The present report employs, for the purpose of the present project, the generic term "pronouncements".[45] Other generic terms which are in use include "findings",[46] "jurisprudence"[47] and "output".[48] The expression "findings" may be misunderstood as being limited to factual determinations, whereas the work of expert bodies often consists of action which is, explicitly or implicitly, declaratory (of law). The term "jurisprudence", on the other hand, may be mistaken as implying that the action of an expert body possesses a judicial quality, which is usually not the case. The term "output", although neutral, may be too broad. The expression "pronouncements", on the other hand, is sufficiently neutral and is able to cover all relevant factual and normative assessments by such expert bodies.

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[40] Article 42 (7) (c), International Covenant on Civil and Political Rights; article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights; article 9 (1) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

[41] Article 9 (2), International Convention on the Elimination of All Forms of Racial Discrimination; article 21 (1), Convention on the Elimination of All Forms of Discrimination against Women; article 45 (d) of the Convention on the Rights of the Child, 1577 UNTS 3; article 33 (5), International Convention for the Protection of All Persons from Enforced Disappearance; article 76 (8) the United Nations Convention on the Law of the Sea.

[42] Article 19 (3), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; article 40 (4), International Covenant on Civil and Political Rights; article 74,International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2220 UNTS 3.

[43] Section XI, para. 36 and section XII, para. 37 of decision I/7 *supra* note 36; article 14 of the Single Convention on Narcotic Drugs.

[44] Section XV of decision 24/CP.7, *supra* note 35.

[45] *International Law Commission, Report of the Sixty-seventh session (2015)*, *supra* note 7, p. 15, para. 26; see also "Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies" (ILA Report), Report of the Seventy-first Conference of the International Law Association, Berlin 2004, p. 5, para. 15; European Commission for Democracy through Law (Venice Commission), Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts (adopted by the Venice Commission at its 100th plenary session, Rome, 10-11 October 2014), CDL-AD(2014)036, p. 31, para. 78.

[46] Article 42 (7) (c), International Covenant on Civil and Political Rights; ILA Report, *supra* note 45, p. 5, para. 16.

[47] *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, 30 November 2010, I.C.J. Reports 2010*, p. 639 at pp. 663-664, para. 66; Rodley, *supra* note 33, p. 640; A. Andrusevych, T. Alge, C. Konrad, eds., Case Law of the Aarhus Convention Compliance Committee (2004-2011), 2nd ed. (RACSE, Lviv 2011); Compilation of findings of the Aarhus Convention Compliance Committee adopted 18 February 2005 to date, available at http://www.unece.org/fileadmin/DAM/env/pp/compliance/Compilation_of_CC_findings.pdf (accessed 3 March 2016).

[48] R. Van Alebeek and A. Nollkaemper, "The legal status of decisions by human rights treaty bodies in national law", in H. Keller and L. Grover, eds., *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge: Cambridge University Press 2012), pp. 356-413, at p. 402; Rodley, *supra* note 33, p. 639; K. Mechlem, "Treaty Bodies and the Interpretation of Human Rights", *Vanderbilt Journal of Transnational Law*, vol. 42 (2009), pp. 905-947, at p. 908.

3. Legal effect of pronouncements of expert bodies generally

15. The legal effect of pronouncements by an expert body depends, first and foremost, on the applicable treaty itself. The effect must be determined by way of applying the rules on treaty interpretation according to articles 31 and 32 of the Vienna Convention on the Law of Treaties. The ordinary meaning of the term by which a treaty designates a particular form of pronouncement mostly indicates that such pronouncements are not legally binding.[49] That is true, for example, for the terms "views" (article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights), "suggestions and recommendations" (article 14 (8) of the International Convention on the Elimination of All Forms of Racial Discrimination) and "recommendations" (article 76 (8) of the United Nations Convention on the Law of the Sea). Sometimes treaties use terms that, as such, are unclear as to whether they imply a legally binding effect, but whose context contributes to identifying possible legal effects.[50] Therefore, treaties usually make it clear, by the terms they use to characterize pronouncements and by providing context, that pronouncements by expert bodies are not, as such, legally binding.[51]

16. That does not exclude the possibility, however, that such pronouncements might be relevant for the interpretation of a treaty as a form of practice subsequently arrived at under the treaty.[52] That possible effect is usually not explicitly addressed by the respective treaties. There are, however, authoritative indications and debates regarding the legal significance, for the purpose of the interpretation of a treaty, of pronouncements of expert bodies.[53] They mostly concern the significance of the pronouncements of expert bodies under human rights treaties (see item 4), but also those of expert bodies in other areas (see item 5).

4. Expert bodies under human rights treaties

17. Pronouncements by expert bodies under human rights treaties are usually adopted in reaction to State reports (e.g., "concluding observations"), or in response to individual communications (e.g., "views"), or regarding the implementation or

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[49] This is generally accepted in the literature, see Rodley, *supra* note 33, p. 639; Tomuschat, *supra* note 27, pp. 233, 267; D. Shelton, "The Legal Status of Normative Pronouncements of Human Rights Treaty Bodies" in H.P. Hestermeyer et al., eds., *Coexistence, Cooperation and Solidarity, Liber Amicorum Rüdiger Wolfrum*, vol. I (Leiden; Boston: Martinus Nijhoff Publishers 2012), p. 559; Keller/Grover, "General Comments of the Human Rights Committee and their legitimacy", in Keller/Grover, ibid., p. 129; Venice Commission, *supra* note 45, p. 30, para. 76.

[50] This is true, for example, for the term "determine" in article 18 of the Kyoto Protocol and decision 24/CP.7, see G. Ulfstein and J. Werksmann, "The Kyoto Compliance System: Towards Hard Enforcement", in O. Stokke, J. Hovi, G. Ulfstein, eds., *Implementing the Climate Regime: International Compliance* (London 2005), pp. 55-56.

[51] ILA Report, *supra* note 45, p. 5, para. 18; Rodley, *supra* note 33, p. 639.

[52] Rodley, *supra* note 33, p. 639; Tomuschat, *supra* note 27, p. 267.

[53] ILA Report, *supra* note 45, pp. 5-7, paras. 15-27; Rodley, *supra* note 33, p. 639; H. Keller and L. Grover, "General Comments of the Human Rights Committee and their legitimacy", in Keller/Grover, *supra* note 48, pp. 116-198, at pp. 129-133; G. Ulfstein, "Individual Complaints", in Keller/Grover, *supra* note 48, pp. 73-115; at pp. 92-93; Van Alebeek/Nollkaemper, *supra* note 48, pp. 409-411; G. Ulfstein, "Treaty Bodies and Regimes", in D. Hollis, ed., *The Oxford Guide to Treaties* (Oxford: Oxford University Press 2012); Mechlem, *supra* note 48, pp. 929-30.

interpretation of the respective treaties generally (e.g., "general comments").[54] The relevance of such pronouncements for the interpretation of the respective treaties is often assessed in general terms.[55]

18. The Human Rights Committee under the International Covenant on Civil and Political Rights did at one stage attempt to explain the relevance of its own pronouncements for the interpretation of the Covenant in terms of the Vienna Convention on the Law of Treaties. In its draft general comment No. 33, the Committee submitted the proposition, for comment by States, that its "general body of jurisprudence", or the acquiescence by States to that jurisprudence, constituted subsequent practice under article 31 (3) (b):

> In relation to the general body of jurisprudence generated by the Committee, it may be considered that it constitutes "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the sense of article 31 (3) (b) of the Vienna Convention on the Law of Treaties, or, alternatively, the acquiescence of States parties in those determinations constitutes such practice.[56]

19. The United States of America, in its comment to draft general comment No. 33, strongly criticized the proposition:

> The views of the Committee cannot as a legal matter constitute the "subsequent practice" of the States Parties to the Covenant ... The provision referred to in this case, Article 31 (3) (b), has never been interpreted, so far as the United States is aware, to include the views of expert bodies. The "subsequent practice" referred to in this provision is generally understood to mean the actual practice of the States Parties, provided that such practice is consistent and is common to, or accepted by, all the Parties. The "subsequent practice" of the States Parties cannot be the views of experts that "serve in their personal capacity" as to what the practice of States Parties should be in carrying out their rights and obligations under the Covenant.[57]

20. Ultimately, the Human Rights Committee adopted general comment No. 33 without an explicit reference to article 31 (3) (b) or to the possible significance of

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[54] W. Kälin, "Examination of state reports", in Keller/Grover, *supra* note 48, pp. 16-72; Ulfstein, *supra* note 53, pp. 73-115; Mechlem, *supra* note 48, pp. 922-930; the legal basis for general comments under the International Covenant on Civil and Political Rights is article 40 (4), but this practice has been generally accepted also with regard to other expert bodies under human rights treaties, see Keller/Grover, *supra* note 53, pp. 127-28.

[55] E.g., Rodley, *supra* note 33, p. 639; Shelton, *supra* note 49, pp. 574-575; A. Boyle and C. Chinkin, *The Making of International Law* (Oxford: Oxford University Press 2007), p. 155.

[56] Draft general comment No. 33 (The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights) (Second revised version as of 18 August 2008) (CCPR/C/GC/33/CRP.3), 25 August 2008, at para. 17; this position has also been put forward by several authors, see Keller/Grover, *supra* note 53, pp. 130-132 with further references.

[57] Comments of the United States on the Human Rights Committee's "Draft general comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant Civil and Political Rights", para. 17, October 17, 2008, available at http://www.state.gov/documents/organization/138851.pdf (accessed 3 March 2016).

its views, and the reactions of States parties to them, as a form of subsequent practice.[58] The Committee, rather, concluded:

> While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the Views issued by the Committee under the Optional Protocol exhibit some of the principal characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.[59]
>
> ...
>
> The Views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These Views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.[60]

21. The fact that the Committee did not pursue its proposal to consider its views, individually or collectively, to be a "general body of jurisprudence" and a form of subsequent practice under article 31 (3) (b) does not, however, necessarily lead to the conclusion that its pronouncements are irrelevant in the context of the present topic.

22. The question of the legal significance of pronouncements of expert bodies under human rights treaties, for the purpose of their interpretation, has been considered by international and national courts as well as by scientific bodies and many authors.[61] Among authors the views range from those who consider the value of such pronouncements to be minimal[62] to those who consider that they possess an

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[58] CCPR/C/GC/33.

[59] Ibid., para. 11.

[60] Ibid., para. 13.

[61] See *supra* note 53 as well as P. Alston and R. Goodman, *International Human Rights* (Oxford: Oxford University Press 2012), pp. 834-835; M. Nowak and E. McArthur, *The United Nations Convention against torture: A Commentary* (Oxford: Oxford University Press 2008), pp. 77-78; Tomuschat, *supra* note 27, pp. 233-237, 266-268; M. O'Flaherty, "The Concluding Observations of United Nations Human Rights Treaty Bodies", *Human Rights Law Review*, vol. 6 (2006), pp. 27-52, at p. 35; R. Hanski and M. Scheinin, eds., *Leading Cases of the Human Rights Committee* (Turku/Åbo: Institute for Human Rights 2007), pp. 23-24.

[62] E.g., N. Ando, "L'avenir des organes de supervision: Limites et possibilités du Comité des droits de l'homme", (1991-1992) *Annuaire Canadien des droits de la personne*, pp. 183-189 at p. 186: M.J. Dennis and D.P. Stewart, "Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health", 98 (2004) *American Journal of International Law*, pp. 462-515 at pp. 493-495; Information provided by the Special Rapporteur on the Right to Education Ms. Katarina Tomasevski (3 February 2004), Commission on Human Rights, First session of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (23 February – 5 March 2005), (E/CN.4/2004/WG.23/CRP.4, para. 8) ("Another important issue for the Working Group to consider is the impact of general comments of the Committee on Economic, Social and Cultural Rights on the prospects for an optional protocol to the ICESCR. The Committee has adopted various general comments which reach far beyond the text of the ICESCR. (...) While this practice would support a rights-based rather than treaty-based human rights approach, it undermines the principle of legal security by reading into a legal text a contents which simply is not there. A helpful interpretative principle may therefore be a focus on the legal meaning of economic, social and cultural rights as affirmed in international and domestic jurisprudence.").

authoritative character[63] and thereby "tend to transform them into legally binding obligations".[64]

23. The "Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies", which the International Law Association adopted in 2004, provides a good point of departure.[65] The report is based on a comprehensive collection of court decisions from a broad range of States, decisions by international courts and publications that were reasonably retrievable at the time of the report, as well as the deliberations of members of the International Law Association Committee concerned. The report proceeds from the generally recognized position that pronouncements of expert bodies under human rights treaties "do not themselves constitute binding interpretations of the treaties".[66] The report also emphasizes that:

> Governments have tended to stress that, while the views, concluding observations and comments, and general comments and recommendations of the treaty bodies are to be accorded considerable importance as the pronouncements of body expert in the issues covered by the treaty, they are not in themselves formally binding interpretations of the treaty.[67]

24. In support, the report quotes a statement by Norway as an example:

> While the recommendations and criticism of the monitoring committees are not legally binding, the Norwegian authorities attach great importance to them and they constitute important guidelines in the continuous efforts to ensure the conscientious implementation of human rights conventions.[68]

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[63] E.g., M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (Kehl am Rhein: Engel Verlag, 2nd ed. 2005), at p. 893; Scheinin, *supra* note 61, p. 23; H.J. Steiner and P. Iston, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Oxford University Press, 2nd ed., 2000) p. 265.

[64] Van Alebeek/Nollkaemper, *supra* note 48, pp. 384-385; see also Ulfstein, *supra* note 53, pp. 92-93.

[65] ILA Report, *supra* note 45.

[66] ILA Report, *supra* note 45, p. 5, para. 15; Tomuschat, *supra* note 27, pp. 233 and 267.

[67] ILA Report, *supra* note 45, p. 5, para. 16.

[68] Norwegian Ministry of Foreign Affairs, "Human Rights in Norway", *White Paper to the Storting* (St.meld. nr. 21 (1999-2000) Menneskeverd i sentrum, 4. Menneskerettigheter i Norge), English translation at https://www.regjeringen.no/no/dokument/dep/ud/stmeld/19992000/report_no-21_to_the_storting_1999-2000/4/3/2/id192530/ (accessed 3 March 2016); comments by the Government of the United States on the concluding observations of the Human Rights Committee, 12 February 2008, (CCPR/C/USA/CO/3/Rev.1/Add.1, 8-9); views of the Australian Government on draft general comment No. 35 on article 9 of the International Covenant on Civil and Political Rights – Right to Liberty and Security of Person and Freedom from Arbitrary Arrest and Detention, May 2014, http://www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx (accessed 3 March 2016), para. 6 ("Australia regards the views of the Committee on the interpretation of the rights under the Covenant as authoritative, however, it does not consider that they are determinative of the nature and scope of those obligations."); statement of the Canadian delegation during the discussion of the Human Rights Council's report on Canada, press release, 8 July 2015 ("The committee's views were not legally binding, but Canada had accepted its views in a majority of cases."), http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16215&LangID=E (accessed 3 March 2016); observations by the Government of the United Kingdom on Human Rights Committee General Comment No. 24 (CCPR A/50/40) (1995) ("The United Kingdom is of course aware that the General Comments adopted by the Committee are not legally binding.").

25. On that basis, the report then addresses the "more difficult question" of whether pronouncements of expert bodies under human rights treaties "fit into traditional sources of international law, whether for the purposes of treaty interpretation or as a source relevant to the development of customary international law".[69] The report distinguishes between two possible approaches:

> If one adopts a traditional approach to interpretation of the human rights treaties — an approach strongly endorsed by the International Law Commission and some States in the specific context of reservations — the findings of the Committees themselves would not amount to State practice ... However, the responses of individual States or of the States parties as a whole to the findings of the committees would constitute such practice.[70]

26. According to the second, alternative approach:

> The reference in article 31 to subsequent practice — as with so many other provisions in the [Vienna Convention on the Law of Treaties] — is written as if no monitoring body had been established by a treaty, as if no third-party interests existed, and as if it were only for other States to monitor each other's compliance and to react to non-compliance. Human rights treaties are different in some important respects from the presumed ideal type of a multilateral treaty which underpins the formulation of the individual provisions of the [Vienna Convention on the Law of Treaties]. Given these differences it appears arguable that in interpreting these types of treaties ... relevant subsequent practice might be broader than subsequent State practice and include the considered view of the treaty bodies adopted in the performance of the functions conferred on them by the States parties.[71]

27. The report, without explicitly taking a position as to which of the two positions is the correct one, pursues its own analysis by describing the practice of States parties in reaction to pronouncements of human rights bodies. It focuses in particular on how national and international courts have considered such pronouncements for the purpose of interpretation. It is indeed appropriate, before raising the question of whether human rights treaties call for special methods of interpretation,[72] to look at which positions international courts and States parties, and in particular their courts, have adopted regarding the interpretative relevance of pronouncements of human rights expert bodies.

(a) International courts

28. The International Court of Justice has confirmed, in particular in 2010 in the case *Ahmadou Sadio Diallo* that pronouncements of the Human Rights Committee are relevant for the purpose of the interpretation of the International Covenant on Civil and Political Rights:

> Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of

[69] ILA Report, *supra* note 45, p. 5, para. 17.
[70] ILA Report, *supra* note 45, p. 6, para. 21.
[71] ILA Report, *supra* note 45, p. 6, para. 22.
[72] B. Schlütter B, "Aspects of human rights interpretation by the UN treaty bodies", in Keller/Grover, *supra* note 48, pp. 261-319, at pp. 263-266.

States parties to the first Optional Protocol, and in the form of "General Comments".

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.[73]

29. The final report of the International Law Association comes to a similar conclusion regarding international courts. Regional human rights courts have also used pronouncements of expert bodies as a possible source of inspiration, but they have not treated them as binding.[74]

30. As with other international courts, the International Court of Justice did not, however, explain the relevance of "the interpretation adopted by this independent body" in terms of the rules of interpretation under the Vienna Convention on the Law of Treaties.[75]

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[73] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Judgment, 30 November 2010, I.C.J. Reports 2010,* p. 639, at pp. 663-664, para. 66; see also *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10, at p. 27, para. 39; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136 at pp. 179-181, paras. 109, 110 and 112 and at pp. 192-193, para. 136, in which the Court referred to various pronouncements of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights; see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 457, para. 101, referring to pronouncements of the Committee against Torture when determining the temporal scope of the Convention against Torture.

[74] The Inter-American Court of Human Rights, *The Constitutional Court (Camba Campos and Others) v. Ecuador*, Judgment of 28 August 2013, paras. 189 and 191; African Commission on Human and Peoples' Rights, *Civil Liberties Organisation and others v. Nigeria,* Communication No. 218/98, Decisions on communications brought before the African Commission, Twenty-ninth Ordinary Session, Tripoli, Libya, May 2001 at para. 24 ("In interpreting and applying the Charter, the Commission relies on the growing body of legal precedents established in its decisions over a period of nearly fifteen years. This Commission is also enjoined by the Charter and by international human rights standards, which include decisions and general comments by UN treaty bodies."); African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Centre and The Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decisions on communications brought before the African Commission, Thirtieth Ordinary Session, Banjul, the Gambia, October 2001 at para. 63 ("draws inspiration from the definition of the term "forced evictions" by the Committee on Economic Social and Cultural Rights in its in General comment No. 7"); *Margus v. Croatia*, Judgment, 27 May 2014, Application No. 4455/10 [2014] ECHR 523 paras. 48-50; *Baka v. Hungary,* Judgment, 27 May 2014, Application No. 20261/12 [2014] ECHR 528, para. 58; *Othman (Abu Qatada) v. United Kingdom,* Judgment, 17 January 2012, Application No. 8139/09 [2012] ECHR 56, paras. 107-108, 147-151, 155f., 158; *Gäfgen v. Germany*, Judgment, 1 June 2010, Application No. 22978/05 [2010] ECHR 759, paras. 68 and 70-72; see more broadly regarding regional courts: ILA Report, *supra* note 45, pp. 29-38, paras. 116-155.

[75] ILA Report, *supra* note 45, p. 5, para. 17.

(b) Domestic courts

31. The final report of the International Law Association found a large number of decisions in which national courts have referred to pronouncements of human rights bodies.[76] The report, while recognizing certain "limitations of its data collection and analysis",[77] nevertheless provides a broad and regionally rather representative collection of decisions that does not seem to have been replaced by a richer specific analysis.[78]

32. In the large majority of the decisions the domestic courts considered that pronouncements by expert bodies under human rights treaties were not legally binding on them as such;[79] other reasons included the fact that such bodies are not courts[80] or that there was no legal basis in domestic law.[81] Most courts did, however, recognize that such pronouncements nevertheless "deserve to be given considerable weight in determining the meaning of a relevant right and the determination of a violation".[82] The German Federal Administrative Court has justified that approach:

> These texts are not binding under international law. But the concluding observations give indications of what is generally consented in state practice. General Comments authoritatively articulate the standards in the practice of the Committee on Economic, Social and Cultural Rights, and thus serve as

[76] ILA Report, *supra* note 45, pp. 13-27, paras. 46-109.

[77] ILA Report, *supra* note 45, p. 44, para. 179, and p. 7, para. 28, footnote 29.

[78] The collection "Oxford Reports on International Law in Domestic Courts (ILDC)" contains a number of relevant cases, see http://opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts (accessed 3 March 2016).

[79] See the decisions quoted in the report of the Venice Commission, *supra* note 45, p. 30 (Ireland, Supreme Court: *Kavanagh (Joseph) v. Governor of Mountjoy Prison and Attorney General* [2002] IESC 13, para. 36; France, Council of State: *Hauchemaille v. France*, 11 October 2001, ILDC 767 (FR 2001), para. 22.

[80] France, Council of State: *Hauchemaille v. France*, *supra* note 79, para. 22; Sri Lanka, Supreme Court: *Singarasa (Nallaratnam) v. Attorney General, Application for judicial review*, 15 September 2006, SC Spl (LA) No 182/99, para. 21; New Zealand, Court of Appeal: *Wellington District Legal Services Committee v. Tangiora* [1998] 1 NZLR 129, 137; Spain, Constitutional Court, Judgment of 3 April 2002, Case No. STC 70/2002, para. 7.a).

[81] Canada, Ontario Court of Appeal: *Ahani v. Canada (Attorney General), Revised February 12, 2002*, para. 33 ("To give effect to Ahani's position, however, would convert a non-binding request, in a Protocol which has never been part of Canadian law, into a binding obligation enforceable in Canada by a Canadian court, and more, into a constitutional principle of fundamental justice. Respectfully, I find that an untenable result."); Ireland, Supreme Court: *Kavanagh (Joseph) v. Governor of Mountjoy Prison and Attorney General*, *supra* note 79, para. 42 ("The terms of the Covenant have not been enacted into Irish law. They cannot prevail over the provisions of the Offences against the State Act, 1939 or of a conviction by a court established under its provisions. For the reasons already stated, the views of the Committee cannot be invoked to invalidate that conviction without contravening the terms of article 29, section 6 article 15, section 2 (1) and article 34 section 1 of the Constitution."). But see Van Alebeek/Nollkaemper, *supra* note 48, pp. 367-371, who quote decisions by domestic courts that have enabled the taking into account and implementation of pronouncements of expert bodies under human rights treaties in dualist legal systems, at pp. 379-380.

[82] ILA Report, *supra* note 45, p. 43, para. 175.

means of interpretation and contribute to shaping the understanding of the terms of the treaty by the States parties.[83]

33. It was only exceptionally that a domestic court either considered a pronouncement of a human rights body to be "authoritative"[84] or, on the contrary, to have "no value".[85] A more recent analysis has confirmed that picture.[86] The final report of the International Law Association summarized its respective findings as follows:

> While national courts have generally not been prepared to accept that they are formally bound by committee interpretations of treaty provisions, most courts have recognized that, as expert bodies entrusted by the States parties with functions under the treaty, the treaty bodies' interpretations deserve to be given considerable weight in determining the meaning of a relevant right and the existence of a violation.[87]

34. That conclusion, however, is not incompatible with the fact that there are also decisions of domestic courts which do not refer to treaty bodies, although relevant pronouncements exist, a fact which led R. Van Alebeek and A. Nollkaemper to conclude:

> In brief, as a consequence of the non-binding nature of these decisions, national courts seem to generally approach treaty body output in a pick-and-choose manner. If courts are convinced by the interpretation of state obligations found in the treaty body output, they refer to its authoritative status. If not, its non-binding nature is emphasized.[88]

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[83] Germany, Federal Administrative Court: BVerwGE vol. 134, p. 1, at p. 22, para. 48 (translation by the author; original: "Diese Texte sind völkerrechtlich nicht verbindlich. Jedoch können den abschließenden Bemerkungen Hinweise auf die allgemeine konsentierte Staatenpraxis entnommen werden. Die allgemeinen Bemerkungen beschreiben in autorisierter Form die Standards in der Praxis des Sozialausschusses, dienen damit als Interpretationshilfe und prägen so das Verständnis der vertraglichen Rechtsbegriffe durch die Vertragsstaaten mit.").

[84] South Africa, High Court Witwatersrand: *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*, 2002 (6) BCLR p. 625, at p. 629 ("general comments have an authoritative status under international law"); Hong Kong, Court of Appeal: *R v. Sin Yau-ming, 30 September 1991*, (1991) 1 HKPLR, p. 88, at p. 89, para. 3 ("considerable weight"); Canada, Supreme Court: *Suresh v. Canada, 11 January 2002*, [2002] 1 S.C.R. 3, 2002 SCC 1, para. 67 ("clear import of the ICCPR"); New Zealand, Court of Appeal: *R. v. Goodwin (No. 2)*, [1990-1992] 3 N.Z.B.O.R.R. p. 314, at p. 321 ("considerable persuasive authority"); Netherlands, Central Appeals Tribunal: *Appellante v. de Raad van Bestuur van de Sociale Verzekeringsbank*, 21 July 2006, LJN: AY5560 (stating that even though the views of the Committee were not binding they have considerable weight for the interpretation and departure from them is only permissible if there are overriding reasons of public interest); Belize, Supreme Court: *Cal and Others v. Attorney-General of Belize and Minister of Naturol Resources and Environment & Coy and Others v. Attorney-General of Belize and Minister of Natural Resources and Environment, 18 October 2007*, (2007) 135 ILR 77.

[85] United Kingdom, House of Lords: *Jones v. Saudi Arabia, 14 June 2006*, [2006] UKHL 26; (2007) 1 AC 270, para. 57 ("no value"); Japan, Tokyo District Court: Judgment of 15 March 2001, 1784 Hanrei Jiho 67, at 74 ("the General Comment neither represents authoritative interpretation of the ICCPR nor binds the interpretation of the treaty in Japan").

[86] Van Alebeek/Nollkaemper, *supra* note 48, pp. 397-404.

[87] ILA Report, *supra* note 45, p. 43, para. 175.

[88] Van Alebeek/Nollkaemper, *supra* note 48, pp. 402-403.

35. When considering such pronouncements and referring to them, domestic courts have only rarely attempted to explain the legal basis for their assessment that such pronouncements, while not legally binding as such, should or need to be taken into account. They have mostly merely referred to those pronouncements in passing.[89]

(c) Previous work of the Commission

36. In its *Guide to Practice on Reservations to Treaties*,[90] the Commission addressed the question of the legal effect, for the purpose of treaty interpretation, of pronouncements of expert bodies under human rights treaties. Guideline 3.2.1 reads:

> **Competence of the treaty monitoring bodies to assess the permissibility of reservations**
>
> 1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.
>
> 2. The assessment made by such a body in the exercise of this competence has no greater legal effect than that of the act which contains it.

37. The guideline assumes that pronouncements of treaty monitoring bodies that assess the permissibility of reservations produce the same effect as, and therefore have no greater effect than, such pronouncements generally. The carefully crafted guideline does not address the question of which exact legal effect, for the purposes of interpretation of the treaty, such pronouncements produce. That question is, however, addressed more directly in guideline 3.2.3:

> **Consideration of the assessments of treaty monitoring bodies**
>
> States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body shall give consideration to that body's assessment of the permissibility of the reservations.

38. In its commentary to that guideline, the Commission stated:

> There is no doubt that contracting States or contracting organizations have a general duty to cooperate with the treaty monitoring bodies that they have established — which is what is evoked by the expression "shall give consideration" in the first part of the guideline. Of course, if such bodies have been vested with decision-making power the parties must respect their decisions, but this is currently not the case in practice except for some regional human rights courts. In contrast, the other monitoring bodies lack any juridical decision-making power, either in the area of reservations or in other areas in which they possess declaratory powers. Consequently, their conclusions are not legally binding, and States parties are obliged only to "take account" of their assessments in good faith.[91]

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[89] Van Alebeek/Nollkaemper, *supra* note 48, p. 401; one of the few judgments in which this was the case is High Court of Osaka, Judgment of 28 October 1994, 1513 *Hanrei Jiho* 71, 87, 38 Japanese Annual of International Law 118 (1995); Germany, Federal Administrative Court, *supra* note 83.

[90] *International Law Commission, Report of the Sixty-third session (2011)*, *supra* note 2.

[91] Ibid., p. 402, para. 3.

39. The commentary by the Commission is not limited to pronouncements of treaty monitoring bodies regarding the permissibility of reservations. It is formulated in general terms and on the basis of considerations that are generally applicable to pronouncements of such bodies in the fulfilment of their mandate. The commentary makes a statement not only regarding the legal effect of a pronouncement of a monitoring body as such, but also, by necessary implication, regarding their effect for the interpretation of the treaty itself.

40. Like most international and national courts, the Commission has not explained its position in terms of the general rules of interpretation under the Vienna Convention on the Law of Treaties. It is to that question that the present report now turns.

(d) Relevance of pronouncements according to the rules of interpretation of the Vienna Convention on the Law of Treaties

41. Some authors have questioned whether it is appropriate to interpret human rights treaties according to the general rules of interpretation under articles 31 and 32 of the Vienna Convention on the Law of Treaties, invoking a supposed special nature of such treaties.[92] Other authors have defended the applicability of articles 31 and 32 to human rights treaties by pointing out, inter alia, that the provisions leave room for eventual specific aspects of human rights treaties.[93] The Commission itself, when considering draft conclusion 1 of the present project, left the question open as to whether it should refer to the "nature" of a treaty as a relevant consideration for its interpretation, but agreed that all questions of treaty interpretation can be resolved within the framework of articles 31 and 32 of the Vienna Convention.[94] There is indeed no reason why articles 31 and 32 would be insufficient to deal with particular aspects of human rights treaties. The provisions, and the Vienna Convention generally, are not only suitable for a limited "ideal type" of multilateral treaty,[95] but they were even elaborated when the existence of expert bodies within the emerging human rights regime was already well known.[96] Indeed, expert bodies under human rights treaties, like international human rights courts, themselves occasionally invoke and apply the Vienna Convention's rules on interpretation.[97]

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[92] M. Craven, "Legal Differentiation and the Concept of the Human Rights Treaty in International Law", *European Journal of International Law* (2000), vol. 11, No. 3, pp. 489-519 at pp. 497-499; T. Giegerich, "Reservations to Multilateral Treaties" (2010), in *Max Planck Encyclopedia of Public International Law*. Available at http://www.mpepil.com (accessed 3 March 2016), para. 31.

[93] M. Fitzmaurice, "Interpretation of Human Rights Treaties", in D. Shelton, ed., *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press 2013), pp. 739-771, in particular 769-70; R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2nd ed. 2014), pp. 474-478; Mechlem, *supra* note 48, pp. 919-920.; Schlütter, *supra* note 72, p. 317.

[94] *International Law Commission, Report of the Sixty-fifth session (2013)*, *supra* note 3, pp. 19-20, para. 19.

[95] ILA Report, *supra* note 45, p. 6, para. 22.

[96] The International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights were both adopted in 1966, after long and well-known negotiations.

[97] See, e.g., Communication 118/1982, *Alberta Union v. Canada*, Views adopted on 18 July 1986, para. 6.3; G. Nolte, "Second Report on Treaties over time", in G. Nolte, ed., *Treaties and Subsequent Practice* (Oxford: Oxford University Press 2013), pp. 276-277, 244-246 (European Court of Human Rights), 269-270 (Inter-American Court of Human Rights); Schlütter, *supra* note 72, p. 273; Keller/Grover, *supra* note 53, p. 164.

It is therefore appropriate to assess the relevance of pronouncements of expert bodies for the purpose of the interpretation of human rights treaties on the basis and within the framework of the Vienna Convention's rules of interpretation.

Pronouncements as reflecting or giving rise to subsequent agreements or subsequent practice of the States parties themselves

42. A pronouncement of an expert body under a human rights treaty cannot, as such, constitute subsequent practice under article 31 (3) (b), since that provision requires that a subsequent practice in the application of the treaty establishes the agreement of the parties. Indeed, the Human Rights Committee has abandoned its own proposal to consider its pronouncements to be a form of subsequent practice under article 31 (3) (b).[98]

43. Pronouncements of expert bodies may, however, reflect or give rise to a subsequent agreement or a subsequent practice *by the parties themselves* which establish their agreement regarding the interpretation of the treaty under article 31 (3) (a) or (b). That possibility has been recognized by the Commission,[99] by States,[100] by the final report of the International Law Association[101] and by authors.[102] There is indeed no reason why a subsequent agreement between the parties or subsequent practice that establishes the agreement of *the parties themselves* regarding the interpretation of a treaty could not arise from, or be reflected in, a pronouncement of a human rights expert body. Such a possibility would not circumvent the treaty provisions according to which such pronouncements are not binding since the legal effect under article 31 (3) (a) or (b) would not be produced by the pronouncement itself, but rather arise from the conduct and from the agreement of the States parties.

44. Whereas a pronouncement by a human rights expert body can, in principle, give rise to a subsequent agreement or a subsequent practice *by the parties* under article 31 (3) (a) and (b), that possibility is not easily fulfilled in practice.[103] Most human rights treaties at the universal level have many parties. It will mostly be very difficult to establish that all parties have agreed, explicitly or by way of their practice, that a particular pronouncement of an expert body reflects the correct interpretation of the treaty. In fact, expert bodies under human rights treaties themselves have rarely attempted to specifically identify the practice of the parties for the purpose of interpreting a particular treaty provision.[104]

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[98] See *supra* note 58.

[99] *International Law Commission, Report of the Sixty-fifth session (2013)*, *supra* note 3, p. 23, para. 10.

[100] "'States Parties' reactions to the pronouncements or activities of a treaty body might, in some circumstances, constitute subsequent practice (of those States) for the purposes of article 31, paragraph 3." Statement of the United States before the Sixth Committee on 3 November 2015 (A/C.6/70/SR.22, para. 46).

[101] ILA Report, *supra* note 45, p. 6, para. 21.

[102] Mechlem, *supra* note 48, pp. 920-921; Schlütter, *supra* note 72, pp. 289-290; M. Herdegen, *Völkerrecht* (Munich, 10th ed., 2011), p. 125; Ulfstein, *supra* note 53, p. 96; M. Craven, *The International Covenant on Economic, Social and Cultural Rights - A Perspective on its Development* (Oxford: Clarendon Press 1995), p. 91.

[103] Schlütter, *supra* note 72, pp. 293 and 318.

[104] See examples in Nolte, *supra* note 97, pp. 278-282, in particular p. 281; Schlütter, *supra* note 72, p. 318; in this respect the practice of the expert bodies under the universal human rights treaties differs considerably from that of the European Court of Human Rights, see Nolte, ibid., pp. 246-262.

45. The pronouncement by the Committee under the International Covenant on Economic, Social and Cultural Rights, in its general comment No. 15 (2002), that articles 11 and 12 of that Covenant imply a right to water, offers an example for the way in which an agreement of the parties may come about.[105] After a debate over a number of years the General Assembly on 17 December 2015 finally adopted a resolution, on the basis of consensus, that follows the interpretation of the Committee.[106] That resolution may reflect an agreement under article 31 (3) (a) or (b) depending on whether the consensus actually implies the acceptance of all the parties regarding the interpretation which is contained in the pronouncement.[107]

46. Another way for pronouncements of expert bodies to reflect or give rise to a subsequent agreement or subsequent practice under article 31 (3) (a) or (b) may result from the recent practice of the Human Rights Committee under the International Covenant on Civil and Political Rights of submitting drafts of general comments to States for comments before their adoption.[108] Depending on the reactions of States, such general comments may ultimately reflect or give rise to an agreement of the parties regarding the interpretation of a treaty.

47. In many cases an agreement of all the parties to a treaty regarding the interpretation contained in a pronouncement would only be conceivable if the absence of objections can be counted as reflecting an agreement by those State parties that have remained silent. In respect of that question the Commission has provisionally adopted draft conclusion 9 (2), according to which: "Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction."[109]

48. Whereas a State party to a human rights treaty may have an obligation, under the general duty to cooperate under the treaty, to take into account and to react to those pronouncements of an expert body which are specifically addressed to it (such as a pronouncement regarding the permissibility of a reservation which it has formulated,[110] or individual communications regarding its conduct and its own report[111]), it cannot be expected that States parties react to every pronouncement by

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[105] Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002), (E/C.12/2002/11), 20 January 2003.

[106] General Assembly resolution 70/169 (17 December 2015) adopted without a vote, recalling general comment No. 15: The Right to Water (20 January 2003) (E/C.12/2002/11) of the Committee on Economic, Social and Cultural Rights; see before Assembly resolution 64/292 (28 July 2010) which was adopted with 41 abstentions.

[107] See draft conclusion 10 (3) and accompanying commentary at *International Law Commission, Report of the Sixty-sixth session (2014)*, *supra* note 5, pp. 214-217, at paras. 31-38.

[108] Rodley, *supra* note 33, pp. 631-632; Keller/Grover, *supra* note 53, pp. 172-173: see statements of Ireland, Belarus, Switzerland, United Kingdom, Canada, United States, Australia and Japan prior to the adoption of general comment No. 35 of the Human Rights Committee in reaction to its draft at http://www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx (accessed 3 March 2016) ("Procedure for the Adoption of the General Comment").

[109] See draft conclusion 9 (2), *supra* note 107, p. 167, para. 71.

[110] *International Law Commission, Report of the Sixty-third session (2011)*, *supra* note 2, Chapter XI, p. 402, at para. 3.

[111] C. Tomuschat, "Human Rights Committee", in R. Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law* at http://www.mpepil.com, para. 14 ("not to react at all would be a violation").

such a body, be it addressed to another State or to all States generally.[112] The practice of one or more States parties that follow a pronouncement by a human rights expert body "in the application of the treaty" also does not usually call for some reaction by those other States parties that have not engaged in such practice.[113] It is true that regional human rights courts have sometimes recognized that the practice of a substantial majority of States parties may have an effect on the interpretation of a treaty.[114] But such courts have not taken the position that other States parties should have reacted in order to prevent such an effect. Human rights treaties are applied in a multitude of cases and their enforcement is typically expected to take place through specific national procedures. It would therefore be difficult to determine under which circumstances, among the multitude of applications of a human rights treaty, a reaction by other States parties would be called for. It cannot be excluded, however, that a particular pronouncement or practice may exceptionally "call for some reaction", perhaps owing to the importance of the rule in question or the intensity of the debate among States in a particular case.

Pronouncements of treaty bodies as a relevant means of interpretation as such

49. Apart from possibly giving rise to, or reflecting, subsequent agreements or subsequent practice of the parties themselves under article 31 (3) (a) and (b) of the Vienna Convention on the Law of Treaties, pronouncements by human rights expert bodies may also be a relevant means of interpretation as such.

50. Since pronouncements of expert bodies are usually not legally binding, any possible legal effect for the purpose of interpretation must be a lesser one.[115] Two well-known categories of such a lesser effect exist: the first is that pronouncements of expert bodies, while not binding, nevertheless "shall" be "taken into account". The second possibility is that such pronouncements simply "may" be taken into account. The distinction between "shall" and "may" can be found in articles 31 and 32 of the Vienna Convention on the Law of Treaties. Article 31 designates the principal means of interpretation which any interpreter of a treaty *needs* to take into account, whereas article 32 describes supplementary means of interpretation which an interpreter *may*, or may not, take into account.

51. It is not apparent why, under the rules of interpretation of the Vienna Convention on the Law of Treaties, pronouncements of expert bodies would *need* to be taken into account. Such pronouncements are not, as such, means of interpretation under article 31. The Commission has, however, stated in the commentary to its Guide to Practice on Reservations to Treaties that while "their

[112] Ulfstein, *supra* note 53, p. 97; it has been said that "in the practice of the HRC to date, there have been no instances where any State other than the one examined has formally commented on the HRC concluding observations", G. Citroni, "The Human Rights Committee and its Role in Interpreting the International Covenant on Civil and Political Rights vis-à-vis States Parties", Blogpost EJIL: Talk!, at http://www.ejiltalk.org/the-human-rights-committee-and-its-role-in-interpreting-the-international-covenant-on-civil-and-political-rights-vis-a-vis-states-parties/ (accessed 3 March 2016).

[113] See Van Alebeek/Nollkaemper, *supra* note 48, p. 410.

[114] *Report of the International Law Commission 2014*, *supra* note 107, p. 199; *Loizidou v. Turkey (Preliminary Objections)*, Judgment, 23 March 1995, Application No. 15318/89, ECHR, Series A, No. 310, paras. 79-80 and 82.

[115] Rodley, *supra* note 33, pp. 632 and 639.

conclusions are not legally binding...States parties are *obliged* only *to "take account" of* their assessments in good faith"[emphasis added].[116] That proposition is not limited to a possibility ("may") to have recourse to pronouncements of expert bodies as a supplementary means of interpretation, as under article 32, but rather appears to designate such pronouncements as a means of interpretation which needs ("shall") be taken into account, as under article 31.

52. The statement in the commentary of the *Guide to Practice on Reservations to Treaties* does not, however, address the relevance of pronouncements of expert bodies under the rules of interpretation of the Vienna Convention on the Law of Treaties. It rather concerns the duty of every State party under a human rights treaty to cooperate in good faith and thus take account of pronouncements that are addressed to it (as are pronouncements regarding the permissibility of a reservation).[117] Moreover, the context in which the comment is formulated suggests that the Commission was not so much concerned with the question of whether parties are actually generally *obliged* to take pronouncements of human rights bodies into account, but rather with explaining that such pronouncements are not binding. That does not exclude that pronouncements of expert bodies, as practice under the treaty generally, may "contribute to the determination of the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty".[118]

53. The practice of international and domestic courts suggests that pronouncements of human rights expert bodies, in the vast majority of cases, are mostly not taken into account by those courts as a matter of obligation but rather in a supplementary fashion.[119] Therefore, domestic and international courts normally use pronouncements of treaty bodies in the way in which article 32 describes

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[116] *International Law Commission, Report of the Sixty-third session (2011)*, *supra* note 2, Chapter XI, p. 402, at para. 3.

[117] Ibid.

[118] Commentary to draft conclusion 1, *International Law Commission, Report of the Sixty-fifth session (2013)*, *supra* note 3, Chapter IV, p. 19, footnote 58; see also draft conclusion 11 (3), see *International Law Commission, Report of the Sixty-seventh session (2015)*, *supra* note 7, Chapter VIII, pp. 100-101, at para. 34.

[119] See, e.g., Netherlands: on the one hand: Central Appeals Tribunal, *supra* note 84; on the other hand: *Annual Report of the Human Rights Committee 1991, Official Records of the General Assembly, Forty-sixth session* (A/46/40) Supplement No. 40, Chapter V sec. J: Netherlands do not share the Human Rights Committee's views and announce payment only "out of respect for the Committee"; United Kingdom: on the one hand: House of Lords, *supra* note 85 ("no value"); on the other hand: House of Lords: *A. v. Secretary of State for the Home Department* [2005] UKHL 71, paras. 34-36 relying heavily on treaty body pronouncements to establish an exclusionary rule of evidence that prevents the use of information obtained by means of torture; Court of Appeal: *R. (on the application of Al-Skeini) v. Secretary of State for Defence, Application for judicial review*, (2005) EWCA Civ 1609, (2006) HRLR 7, para. 101, citing general comment No. 31 of the Human Rights Committee to establish the extraterritorial application of the Human Rights Act 1998; South Africa: on the one hand: *supra* note 84 ("general comments have an authoritative status under international law"); on the other hand: Constitutional Court: *Minister of Health and Others v. Treatment Action Campaign and Others (No 2)* (CCT 8/02) [2002] ZACC 15, paras. 26 and 37, rejecting to apply the "minimum-core standard" set out by the Committee on Economic, Social and Cultural Rights in general comment No. 3); Japan: on the one hand: Osaka High Court, *supra* note 89 ("One may consider that the 'general comments' and 'views' ... should be relied upon"); on the other hand: Tokyo District Court, *supra* note 85, ("the General Comment neither represents authoritative interpretation of the ICCPR nor binds the interpretation of the treaty in Japan").

supplementary means of interpretation. Accordingly, the High Court of Osaka stated: "One may consider that the 'general comments' and 'views'... should be relied upon as supplementary means of interpretation of the ICCPR"[120]

54. States parties to a human rights treaty do not consider that their courts are under a general obligation pursuant to the treaty to take pronouncements of an expert body into account whenever they apply the treaty.[121] Since human rights treaties are typically applied at the domestic level, and since such treaties usually leave room for the way in which States parties transpose the obligations which arise under the treaty in their domestic law,[122] it cannot be assumed that human rights treaties expect domestic courts to always take pronouncements of human rights expert bodies into account as a matter of legal obligation. Such a duty may, however, flow from the domestic law of a particular State itself, in particular if the national constitution is understood as encouraging the reception of international law generally, or at least certain kinds of international obligations.[123]

55. That does not exclude the idea that such pronouncements should nevertheless be taken very seriously. As the International Court of Justice has held, interpreters "should ascribe great weight to the interpretation adopted by this independent body [the Human Rights Committee] that was established specifically to supervise the application of that treaty".[124] The point is rather that the weight that should be given to such pronouncements in each case depends on specific considerations which include the cogency of their reasoning,[125] the character of the treaty and of the treaty provisions in question,[126] the professional composition of the responsible body,[127] the procedure by which a pronouncement has been arrived at[128] and possibly other

[120] Osaka High Court, *supra* note 89.

[121] Van Alebeek/Nollkaemper, *supra* note 48, p. 408.

[122] B. Çali, "Specialized Rules of Treaty Interpretation: Human Rights", in D. Hollis, *supra* note 53, pp. 529-530.

[123] Germany, Federal Constitutional Court, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 ("*Görgülü*"), para. 33 ("This constitutional significance of an agreement under international law [here: the European Convention on Human Rights], aiming at the regional protection of human rights, is the expression of the Basic Law's commitment to international law (Völkerrechtsfreundlichkeit); the Basic Law encourages both the exercise of state sovereignty through the law of international agreements and international cooperation, and the incorporation of the general rules of public international law, and therefore is, if possible, to be interpreted in such a way that no conflict arises with duties of the Federal Republic of Germany under public international law."), available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041014_2bvr148104en.html (accessed 3 March 2016); Rodley, *supra* note 33, p. 641.

[124] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, 30 November 2010, I.C.J. Reports 2010*, p. 639, at pp. 663-664, para. 66.

[125] Sweden, (speaking for the Nordic countries) (A/C.6/70/SR.20, para. 8); the reasoning on which pronouncements of expert bodies under human rights treaties are based is often rather short and not very methodological as far as they elaborate on the interpretation of existing legal obligations arising under the treaty: Nolte, *supra* note 104, p. 277; Kälin, *supra* note 54, pp. 50-60; Mechlem, *supra* note 48, pp. 908 and 930; Shelton, *supra* note 49, p. 574.

[126] Schlütter, *supra* note 72, pp. 266-267.

[127] Depending, inter alia, on whether "persons having legal experience" were involved; see Rodley, *supra* note 33, pp. 624-625.

[128] Rodley, *supra* note 33, pp. 641-644, estimates that, due to the more or less limited scope of activities, different expert bodies under human rights treaties do not have a "similar authority", and he notes that for these bodies "there is too much work to be done, in too short a time, with inadequate resources"; Van Alebeek/Nollkaemper, *supra* note 48, p. 402-403.

factors.[129] It would therefore go too far to accord such pronouncements a general "presumption of substantive correctness",[130] or to even assume that "the final arbiter for interpreting the Covenant [is] the Committee and not individual States".[131]

56. That means, in particular, that an individual pronouncement normally carries less weight than a series of pronouncements or a general comment reflecting a settled position on a question of interpretation (a "jurisprudence" or "case law"). Accordingly, the International Court of Justice has emphasized the "considerable body of interpretative case law" and the "jurisprudence" of the Human Rights Committee in order to substantiate the proposition that "it should ascribe great weight to the interpretation adopted by this independent body" in a general comment as it reflected "30 years of experience in the application of the above-mentioned Article 14".[132] The interpretative weight of a general comment, for the purpose of interpretation, accordingly depends on whether it reflects a thoroughly considered view of the Committee regarding the actual legal content (*lex lata*) of certain provisions of the Covenant,[133] in particular whether the general comment is based on repeated engagement by the Committee with certain specific cases or situations.[134] Every element of a general comment should be assessed separately under that standard.[135] The level of acceptance of a particular pronouncement, or

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[129] It may, for example, happen that the extraordinary circumstances of a particular case contribute to an unbalanced assessment by an expert body; see M. Happold, "Julian Assange and Diplomatic Asylum", at http://www.ejiltalk.org/julian-assange-and-diplomatic-asylum/ (accessed 3 March 2016) (concerning an expert body which does not fall within the scope of the present report), see *supra* at para.0.

[130] Tomuschat, *supra* note 27, p. 267; Scheinin, *supra* note 61, p. 23.

[131] Chair of the Human Rights Committee, Mr. Fabian Omar Salvioli, on the occasion of the consideration of the report by Canada, United Nations press release, 8 July 2015, at http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16215&LangID=E (accessed 3 March 2016).

[132] *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10, at p. 27, para. 39; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p. 136 at p. 179, para. 109, referring to "the constant practice of the Human Rights Committee"; Rodley, *supra* note 33, p. 631 ("close to codification of evolving practice").

[133] Keller/Grover, *supra* note 53, p. 124.

[134] *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10, at p. 27, para. 39, where the Court contrasted the first general comment No. 13 of the Human Rights Committee concerning equality before courts and tribunals with the second general comment on the question (No. 32) and relied on the latter as it reflected "30 years of experience in the application of the above-mentioned Article 14"; G. Ulfstein, "Law-making by human rights treaty bodies", in R. Liivoja and J. Petman, eds., *International Law-Making – Essay in Honour of Jan Klabbers* (London; New York: Routledge, 2014) pp. 249-258 at p. 252.

[135] Thus, for example, general comment No. 14, para. 39, where the Committee under the International Covenant on Economic, Social and Cultural Rights states that "[t]o comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health *in other countries, and to prevent third parties from violating the right in other countries* [emphasis added], if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law" which was clearly a statement *de lege ferenda*, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p. 136, at p. 180, para. 112.

series of pronouncements, by States parties is also an important factor that determines the degree to which States, and their courts, should or need to take them into account.[136] It is, however, also clear that an expert body may always reconsider its own interpretative practice ("case law", "jurisprudence") in the light of further developments.[137]

57. The assessment of the weight to be given to pronouncements of expert bodies under human rights treaties, for the purpose of interpretation, is based on an analysis of State and court practice and of the literature. It avoids a misleading alternative between a "traditional approach" to the interpretation of human rights treaties and an approach which considers that "human rights treaties are different".[138] Pronouncements of expert bodies are no more binding or authoritative than what the respective treaty provides according to the rules of interpretation (articles 31 and 32), but the rules are open enough to take any specific features of such treaties into account.[139]

(e) Pronouncements of treaty bodies as "other subsequent practice" under article 32

58. Pronouncements of expert bodies are a form of practice under human rights treaties that takes place subsequent to their conclusion. The question is whether such pronouncements are therefore "other subsequent practice" under article 32 for the purpose of the present project.

59. In the course of the work on the present topic, the Commission has adopted draft conclusion 1 (4), according to which "recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32".[140] Pronouncements of expert bodies are indeed "in the application of the treaty" since such "application", according to the Commission:

> Includes not only official acts at the international or at the internal level which serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, inter alia, official statements regarding its interpretation.[141]

60. Pronouncements of expert bodies under human rights treaties, as acts in the fulfilment of their mandate given by the States parties under the treaty, are "official statements regarding its interpretation" even if they are not binding. Official statements by individual States parties regarding the interpretation of a treaty are, after all, also not binding (for the other party or parties). The designation of a pronouncement of an expert body as "official" does not, of course, mean that such pronouncements are thereby assimilated to (official) acts of a State. Just as (official) acts of international organizations are not attributed to their member States, the term

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[136] One example in which such factors, in their combination, have led to a situation that at least approaches a situation of subsequent practice under article 31 (3) (b), and its obligation to take such practice into account, is the articulation, by the Committee under the International Covenant on Economic, Social and Cultural Rights, of the right to water; see para. 45 above.

[137] Human Rights Committee, Communication No. 829/1998, *Judge v. Canada*, Views adopted on 5 August 2002, para. 10.4; Nolte, *supra* note 104, p. 277.

[138] Alternative referred to in ILA Report, *supra* note 45, paras. 25-26; but see text *supra* at para. 41.

[139] Ulfstein, *supra* note 53, pp. 99-100.; Van Alebeek/Nollkaemper, *supra* note 48, p. 386.

[140] Draft conclusion 1 (4), *International Law Commission, Report of the Sixty-fifth session (2013)*, *supra* note 3, Chapter IV, p. 11, para. 38.

[141] Ibid., p. 35, para. 17.

"official" only serves to characterize acts that are performed in the exercise of an element of public authority, as opposed to "private acts and omissions".[142] Such an element of authority may also be derived from or be established between States, as in the case of a mandate that is provided to expert bodies by a treaty.

61. However, the classification of pronouncements of expert bodies as "other subsequent practice in the application of the treaty" under article 32 would be excluded if such practice were limited to the practice of one of the *parties* to the treaty. The Commission has provisionally adopted draft conclusion 4 (3), according to which "other subsequent practice consists of conduct by one or more parties in the application of the treaty, after its conclusion".[143] Later, however, the Commission provisionally adopted draft conclusion 11 (3), according to which "practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32".[144] In its commentary to draft conclusion 11 (3) the Commission noted:

> The Commission may revisit the definition of "other subsequent practice" in draft conclusions 1 (4) and 4 (3) in order to clarify whether the practice of an international organization as such should be classified within this category which, so far, is limited to the practice of Parties.[145]

62. The pronouncements of expert bodies under human rights treaties and the practice of an international organization in the application of its own instrument have in common that, while they are not the practice of a party to the treaty, they are nevertheless official pronouncements and conduct whose purpose under the treaty is to contribute to its proper application. Like the practice of international organizations, pronouncements of expert bodies cannot themselves be a form of subsequent practice under article 31 (3) (b). It is, however, their purpose under the treaty to contribute to its interpretation. That means of interpretation is "supplementary" in the sense of article 32 and, in contrast to subsequent practice under article 31 (3) (b), there is no strict obligation to take them "into account". It is sufficient to consider them to be "other subsequent practice" under article 32. Pronouncements of expert bodies may also "contribute to the determination of the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty"[146] without being themselves one of those primary means of interpretation under article 31 (1).

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[142] See article 8 of the Draft articles on responsibility of international organizations, *International Law Commission, Report of the Sixty-third session (2011), Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), Chapter V, p. 54: "The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions."; see also the commentary, ibid., at p. 94, para. 4.

[143] Ibid., p. 11, para. 38.

[144] Draft conclusion 11 (3), *International Law Commission, Report of the Sixty-seventh session (2015), supra* note 7, Chapter VII, p. 89, para. 128.

[145] Ibid., p. 100, footnote 354 with reference to: *International Law Commission, Report of the Sixty-fifth session (2013), supra* note 3, Chapter IV, pp. 11-12.

[146] Commentary to draft conclusion 1, *International Law Commission, Report of the Sixty-fifth session (2013), supra* note 3, Chapter IV, p. 19, footnote 58.

63. The conclusion that pronouncements of human rights expert bodies are, as such, supplementary means of interpretation under article 32 is, in substance, also reflected in article 38 (1) (d) of the Statute of the International Court of Justice. That provision speaks of "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". Whereas article 38 (1) (d) does not explicitly mention pronouncements of expert bodies (which are neither "judicial decisions" nor "teachings ... of publicists"), such pronouncements may "exhibit some of the principal characteristics" of both those means.[147] Whereas views regarding individual communications have certain elements in common with court decisions, general comments have more in common with teachings due to their general nature. General comments may also display features of a jurisprudence, or a settled case law. The fact that article 38 (1) (d) of the Statute only explicitly mentions judicial decisions and teachings of publicists as classical subsidiary means can be explained by the fact that the provision was originally drafted in 1920 and was retained without much discussion in 1946, long before expert bodies and their practice came into existence.[148]

64. Pronouncements of expert bodies may simultaneously be "other subsequent practice" under article 32 of the Vienna Convention on the Law of Treaties and a supplementary means for the determination of the law under article 38 (1) (d) of the Statute of the International Court of Justice. Both provisions do not exclude each other but partly overlap where they refer to the same means, as demonstrated by the fact that decisions of domestic courts are recognized as falling both under article 38 (1) (d) of the Statute and under article 32 of the Vienna Convention.[149] The main difference between both provisions does not lie in the kinds of means which they envisage, but in their function for "determining" the law. Whereas article 38 (1) (d) of the Statute focuses on the evidence for identifying the different sources of international law in judicial proceedings, article 32 of the Convention addresses treaty interpreters regardless of such proceedings.

65. Regardless of whether article 38 (1) (d) of the Statute of the International Court of Justice encompasses pronouncements of treaty bodies or not, it is clear that the provision does not establish an *obligation* of the International Court of Justice, or of other interpreters, to take those "subsidiary means" into account. Interpreters are merely "invited" to do so.[150] The subsidiary means for the determination of the different sources of international law under article 38 (1) (d) of the Statute are therefore, like "supplementary means of interpretation" for treaties under article 32

[147] See CCPR/C/GC/33. Van Alebeek/Nollkaemper, *supra* note 48 pp. 404-408 and 410-11 discuss important factors that distinguish expert bodies from courts, including the different status regarding the independence of their members, see also Ulfstein, *supra* note 53, pp. 79-82; A. Pellet, in A. Zimmermann, K. Oellers-Frahm, C. Tomuschat, C.J. Tams, *The Statute of the International Court of Justice: A Commentary* (2nd ed. 2012), article 38, p. 859-860, para. 318, which discusses "the constant practice" of the Human Rights Committee as part of "jurisprudence".

[148] See article 38 of the Statute of the Permanent Court of International Justice (adopted 16 December 1920, entered into force 20 August 1921) 6 LNTS 389; Pellet, ibid., pp. 738-744, paras. 17-46; United Nations Conference on International Organizations, vol. XIV, pp. 170 and 435-436.

[149] *International Law Commission, Report of the Sixty-fifth session (2013)*, *supra* note 3, Chapter IV, p. 35, para. 17.

[150] Pellet, *supra* note 147, para. 305; Van Alebeek/Nollkaemper, *supra* note 48, p. 411.

of the Vienna Convention on the Law of Treaties, and are materials that interpreters may (and are encouraged but not required to) take into account.

5. Other expert bodies

66. Expert bodies have not only been established under human rights treaties. Other multilateral treaties that provide for such bodies include the United Nations Convention on the Law of the Sea, the Kyoto Protocol to the United Nations Framework Convention on Climate Change, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) and the Single Convention on Narcotic Drugs.[151]

67. It is not necessary, for the purpose of the present report, to deal with all expert bodies that have been established on the basis of treaties. The report does not aim at proposing a conclusion that would articulate a rule that must be applied in all cases. The legal effect of pronouncements by an expert body depends, after all, first and foremost on the applicable treaty itself.[152] That effect must be determined by way of applying the rules on treaty interpretation (articles 31 and 32). Those rules are open enough to provide orientation for all treaties by mandating a process of interpretation that takes several means of interpretation into account in a "single combined operation". They do not, however, provide for hard and fast rules that would risk circumventing the intentions of the parties.[153] The purpose of the present report, in that context, is to highlight certain cases that may provide some orientation for similar cases and to derive an indicative conclusion regarding the possible effect of pronouncements by expert bodies for the interpretation of a treaty.

68. The expert bodies described below are particularly well-known and important examples of bodies which, at least at first sight, possess some similarities with expert bodies under human rights treaties.[154]

(a) Commission on the Limits of the Continental Shelf

69. The Commission on the Limits of the Continental Shelf, in accordance with article 76 (8) and annex II to the United Nations Convention on the Law of the Sea, consists of 21 members who are experts in the fields of geology, geophysics or hydrography. According to article 2 (1) of annex II to the Convention, they serve in their personal capacity. Article 76 states:

> The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

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[151] See above para. 12.

[152] See above para. 15.

[153] *International Law Commission, Report of the Sixty-fifth session (2013)*, *supra* note 3, Chapter IV, pp. 13 and 18-20, paras. 14-18.

[154] J. E. Alvarez, *International Organizations as Law-makers* (Oxford: Oxford University Press 2005), p. 318; G. Ulfstein, "Treaty Bodies", in D. Bodansky, J. Brunnée, E. Hey, eds., *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press 2007), pp 877-889, at p. 888.

70. A recommendation of the Commission is not binding as such. It is, however, a necessary condition if a State wishes to establish the outer limit of its continental shelf as binding among all parties to the Convention. Therefore, only by accepting a recommendation of the Commission can a State achieve a final and binding status of the outer limits of its continental shelf beyond 200 nautical miles under the Convention. If a State disagrees with a recommendation of the Commission it can make a new submission to the Commission (article 8 of annex II to the Convention). That process can be repeated and it can lead to what has been called "a game of ping-pong".[155]

71. Although a recommendation of the Commission under article 76 (8) of the Convention is not binding as such, the question of possible legal effects of such a decision has been debated.[156] The Commission itself has emphasized that its role as a technical review body does not give it the competence to engage in legal interpretation of any parts of the Convention other than article 76 and annex II.[157] For example, the Commission acknowledged, in reaction to a submission made by Japan in 2008,[158] that it has no role regarding matters relating to the legal interpretation of article 121 of the Convention.[159] That position was supported by all parties to the case (China, Japan and the Republic of Korea). China, for example, stated in its communication of 3 August 2011:

> As a body consisting of experts in the fields of geology, geophysics and hydrography, the Commission should avoid the situation in which its work influences the interpretation and application of relevant provisions of the Convention, including Article 121.[160]

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[155] P. R. R. Gardiner, "The Limits of the Area beyond National Jurisdiction – Some Problems with particular reference to the Role of the Commission on the Limits of the Continental Shelf", in G. Blake ed., *Maritime Boundaries and Ocean Resources* (Totowa, New Jersey 1987), pp.63-67, at p. 69; T. L McDorman, "The Continental Shelf", in D. R. Rothwell, A. G. Oude Elferink, K. N. Scott, T. Stephens, eds., *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press 2015), pp. 181-202, at p. 195.

[156] D. Anderson, "Developments in Maritime Boundary Law and Practice", in D. A. Colson, R.W. Smith, eds., *International Maritime Boundaries*, vol. 5 (Leiden; Boston: Martinus Nijhoff Publishers 2005), pp. 3199-3222, at p. 3214; A. Canvar, "Accountability and the Commission on the Limits of the Continental Shelf: Deciding Who Owns the Ocean Floor", *Cornell International Law Journal 42 (2009)*, pp. 387-440, at p. 402-407.

[157] See, e.g., CLCS/64, Twenty-fourth session (2009), paras. 18 and 25, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/536/21/PDF/N0953621.pdf?OpenElement (accessed 3 March 2016); Canvar, ibid., p. 403.

[158] See submission by Japan to the Commission on the Limits of the Continental Shelf pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea, executive summary, available at http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf (accessed 3 March 2016); further documentation on the case is available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_jpn.htm (accessed 3 March 2016); see generally M. S. Gau, "Recent Decisions by the Commission on the Limits of the Continental Shelf on Japan's Submission for Outer Continental Shelf", *Chinese JIL (2012)*, pp. 487-504.

[159] Chairman's statement (CLCS/62), Twenty-third session (2009), paras. 54 and 59, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/307/58/PDF/N0930758.pdf?OpenElement (accessed 3 March 2016).

[160] Quoted in Gau, *supra* note 158, p. 491; see also the statement to that effect by Canada (A/CONF.62/WS/4, para. 15).

72. Whereas the Commission itself does not seem to have expressed more developed views regarding the possible significance, for the purpose of interpretation, of its pronouncements, the International Law Association addressed the question in a report in 2004:

> The Convention does not charge the Commission to consider and make recommendations on legal matters. However, the Commission has to be presumed to be competent to deal with issues concerning the interpretation or application of article 76 or other relevant articles of the Convention to the extent this is required to carry out the functions which are explicitly assigned to it. This conclusion also follows from the fact that the Commission is charged with considering submissions in accordance with article 76 of the Convention. This function includes the question whether the information that has been submitted to the Commission proves that the conditions set out in article 76 are actually met by the coastal State for the specific outer line it proposes. At times this may require the interpretation of specific provisions of article 76.[161]

73. At the same time the report emphasized:

> On the other hand, the competence to interpret and apply article 76 of the Convention rests in the first place with its States parties. The Commission is only competent to deal with the interpretation of the provisions of article 76 and other provisions of the Convention to the extent this is necessary to carry out the functions which have been assigned to it under the Convention. As a consequence, this competence has to be interpreted restrictively.[162]

74. The position of the report echoes guideline 3.2.1 of the International Law Commission's *Guide to Practice on Reservations to Treaties*,[163] according to which "a treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization". The question is whether the conclusion which the International Law Commission draws from there in guideline 3.2.3 ("States and international organizations ... shall give consideration to that body's assessment ...") is transferable to recommendations of the Commission on the Limits of the Continental Shelf. The functions of the Commission on the Limits of the Continental Shelf, however, consist, in the first place, in providing "scientific and technical advice", as reflected in the composition of the Commission which consists of "experts in the fields of geology, geophysics or hydrography". That situation is in marked contrast to expert bodies under human rights treaties whose functions usually consist, in particular, of providing "views" regarding the interpretation of human rights treaties and which are composed of persons with a "recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience" (e.g., article 28 (2) of the International Covenant on Civil and Political Rights). Such differences are relevant for the weight of pronouncements for the purpose of interpretation.

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[161] International Law Association, *Legal Issues of the Outer Continental Shelf*, Berlin Conference (2004), p. 5.

[162] Ibid., pp. 5-6.

[163] *Supra* note 90, A/66/10/Add.1.

75. The Commission on the Limits of the Continental Shelf has, however, adopted scientific and technical guidelines by which it explains, inter alia, how it interprets certain aspects of article 76 of the Convention:[164]

> With these Guidelines, the Commission aims to clarify its interpretation of scientific, technical and legal terms contained in the Convention. Clarification is required in particular because the Convention makes use of scientific terms in a legal context which at times departs significantly from accepted scientific definitions and terminology. In other cases, clarification is required because various terms in the Convention might be left open to several possible and equally acceptable interpretations.[165]

76. That particular pronouncement fulfils a function comparable to a general comment by an expert body under a human rights treaty, giving general advice on how to interpret specific provisions of a treaty, the Commission having "designed these Guidelines with a view to ensuring a uniform and extended State practice".[166]

(b) Compliance Committee under the Kyoto Protocol

77. The Kyoto Protocol to the United Nations Framework Convention on Climate Change provides for different expert bodies whose members are expected to serve in their personal capacity. The Compliance Committee deals with individual non-compliance cases and is competent to determine violations of the Protocol.[167] The Expert Review Teams basically serve to review information on assigned amounts pursuant to article 3, paragraphs 7 and 8, of the Kyoto Protocol and ensure that the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the Compliance Committee have adequate information.[168]

78. The Compliance Committee is made up of two branches: a facilitative branch and an enforcement branch. Each branch consists of 10 members serving in their personal capacities.[169] They "shall have recognized competence relating to climate change and in relevant fields such as scientific, technical, socioeconomical or legal fields".[170]

79. The facilitative branch provides advice and facilitation of assistance to the individual parties, but does not determine legally binding questions of non-compliance. The members of the enforcement branch are required to also have "legal experience".[171] The enforcement branch has the function of determining cases of non-compliance with certain obligations. Furthermore, the enforcement branch deals with disagreements between parties and Expert Review Teams over adjustments or corrections proposed by the Expert Review Teams to the States parties.[172]

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[164] CLCS/11 of 13 May 1999, available at http://www.un.org/depts/los/clcs_new/commission_guidelines.htm (accessed 3 March 2016).
[165] CLCS/11, Introduction 1.3.
[166] CLCS/11, Introduction 1.4; Canvar, *supra* note 156, pp. 404 and 407.
[167] Decision 24/CP.7, FCCC/CP/2001/13/Add.3, Procedures and mechanisms relating to compliance under the Kyoto Protocol, annex; Ulfstein/Werksmann, *supra* note 50, pp. 39-58, at p. 44.
[168] Decision 23/CP.7, FCCC/CP/2001/13/Add.3, Guidelines for review under article 8 of the Kyoto Protocol, appendix I.A.
[169] Decision 24/CP.7, *supra* note 167, annex, sections II, IV, V.
[170] Decision 24/CP.7, *supra* note 167, annex, section II, para. 6.
[171] Decision 24/CP.7, *supra* note 167, annex, section V, para. 3.
[172] Decision 24/CP.7, *supra* note 167, annex, sections X, XIV and XV.

80. The responsibility of the enforcement branch to "determine" cases of non-compliance is based on article 18 of the Kyoto Protocol. The term "to determine" may seem to suggest that the decisions are final (unless overturned on appeal) and binding, but article 18 explicitly requires an amendment of the Protocol for such an effect to take place.[173] It is the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol that may consider reports of the Expert Review Teams, provide general political guidance and consider and decide appeals and has the prerogative to decide on the legal form of the procedures and mechanisms relating to compliance.[174]

81. Like other expert bodies, the compliance mechanism under the Kyoto Protocol has been confronted with the question of the significance, for the purpose of interpretation, of decisions of the Compliance Committee. For example, in a case concerning Croatia regarding the calculation of its assigned amount of CO_2 (2009), the Expert Review Team held that the way Croatia calculated its assigned amount of CO_2 was not in accordance with articles 3 (7) and (8) and 7 (4) of the Kyoto Protocol.[175] Croatia had added 3.5 million tons of CO_2 equivalents to its base year, invoking article 4 of the Convention on Climate Change (which grants flexibility to parties undergoing the process of transition to a market economy) and decision 7/CP.12 (which allows adding the amount of 3.5 million tons). The enforcement branch followed the view of the Expert Review Team and stated that decision 7/CP.12, which was adopted under the Convention, could not be applied to a calculation under the Kyoto Protocol.[176]

82. Croatia objected:

> The error [the enforcement branch of the Compliance Committee] committed is primarily caused by *grammatical* interpretation of the clause, contradicting the Convention and [the Conference of the Parties] decisions, 9/CP.2 in particular.
>
> Instead of grammatical interpretation, [the enforcement branch of the Compliance Committee] should have used *teleological* interpretation focusing on the intention of the Parties of the Convention, respecting particular circumstances of each party. Such interpretation would enable [the enforcement branch of the Compliance Committee] to adopt fair and equitable decision with respect to Croatia honouring the Convention, decision 7/CP.12, specific historical circumstances referring to Croatia, but also provisions of [the Kyoto Protocol].[177]

83. The enforcement branch, in its final decision of 26 November 2009, disagreed:

> After full consideration of the further written submission from Croatia, the enforcement branch concludes that there are not sufficient grounds provided in the submission to alter the preliminary finding of this branch. In this respect, the branch notes that:

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[173] Ulfstein/Werksmann, *supra* note 50, pp. 55-59.

[174] Decision 24/CP.7, *supra* note 167, preamble and annex, section XIII; Ulfstein/Werksmann, *supra* note 50, p. 58.

[175] FCCC/IRR/2008/HRV, Report of the review of the initial report of Croatia, para. 157.

[176] CC-2009-1-6/Croatia/EB, Preliminary finding, para. 21.

[177] CC-2009-1-7/Croatia/EB, Further written submission from Croatia, p. 6.

> (a) Pursuant to Article 31 of the 1969 Vienna Convention on the Law of Treaties and customary international law, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In addressing the questions of implementation before it, the enforcement branch followed this general rule and was not persuaded that it is necessary to follow another method of interpretation.[178]

84. Croatia lodged an appeal against the final decision of the enforcement branch to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol,[179] which it withdrew before the Conference of the Parties considered the case.[180]

85. The Compliance Committee under the Kyoto Protocol has little room for interpretation. Section XV, paragraph 1, of decision 24/CP.7 specifically lists the consequences that shall be applied in different cases.[181] The Committee may possess some discretion with regard to the determination of sanctions but that does not usually involve relevant questions of interpretation.[182] As the case of Croatia shows, there may be exceptional cases in which the Compliance Committee, in order to fulfil its function, needs to interpret the treaty in a way that risks controversy. In such a case, however, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol has the last word and does not need to consider whether the decision of the Compliance Committee is based on a proper interpretation of the treaty. Should the question arise before a court or another body, that institution should consider whether and to what extent legal expertise has been involved in the decision of the Compliance Committee.

86. The decisions of the Compliance Committee contribute to the practice in the application of the treaty. However, it goes too far to say that decisions of the enforcement branch may influence the determination of the applicable law in the international climate regime, "similar to the impact that judicial decisions on the international level have as a subsidiary source of international law".[183]

(c) Compliance Committee under the Aarhus Convention

87. The Compliance Committee under the Aarhus Convention examines compliance issues, makes recommendations and prepares reports.[184] It consists of independent experts: "persons of high moral character and recognized competence

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[178] CC-2009-1-8/Croatia/EB, Final decision, para. 3 (a).

[179] FCCC/KP/CMP/2010/2; CC-2009-1-9/Croatia/EB, Comments from Croatia on the final decision, para. 2.

[180] FCCC/KP/CMP/2011/2; documents relating to the case are available at http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5456.php (accessed 3 March 2016).

[181] See Ulfstein/Werksmann, *supra* note 50, p. 55.

[182] Decision 24/CP.7, *supra* note 167, annex, section XV, para. 1; Ulfstein/Werksmann, *supra* note 50, pp. 55-59.

[183] S. Schiele, *Evolution of International Environmental Regimes, The Case of Climate Change* (Cambridge: Cambridge University Press 2014), p. 180.

[184] V. Koester, "The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)", in Ulfstein/Marauhn/Zimmermann, eds., *Making Treaties Work, Human Rights, Environment and Arms Control* (Cambridge: Cambridge University Press, 2007), pp.179-217, at p. 203; Decision I/7, ECE/MP.PP/2/Add.8, report of the first Meeting of the Parties, annex, section III.

in the fields to which the Convention relates, including persons having legal experience".[185] In order to become final, the pronouncements of the Committee always require the agreement of the party concerned[186] or the endorsement of the Meeting of the Parties to the Convention.[187]

88. The Compliance Committee reports its activities to the Meeting of the Parties and submits recommendations to that body.[188] The Meeting of the Parties may then, upon consideration of the reports or recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention.[189] Therefore, although the Compliance Committee consists of independent experts, its pronouncements always need either the agreement of the party concerned or the endorsement of the Meeting of the Parties.[190] That requirement distinguishes the pronouncements of the Compliance Committee from the pronouncements of expert bodies under human rights treaties and gives them a more preliminary character, which in turn affects the weight that should be given to them for the purpose of interpretation.

89. It should also be mentioned, however, that the Compliance Committee has determined that when making recommendations it implicitly makes (provisional) determinations of non-compliance.[191] On that basis, authors have proposed that the Committee should be seen as "an independent and impartial review body of a quasi-judicial nature"[192] whose pronouncements result in a "case law".[193] The Supreme Court of the United Kingdom of Great Britain and Northern Ireland has held that "the decisions of the Committee deserve respect on issues relating to standards of public participation".[194] And the Court of Appeal of England and Wales (Civil Division) stated that "there is persuasive authority ... in decisions of the Aarhus Compliance Committee".[195] The Advocate General of the European Court of Justice has also repeatedly invoked recommendations of the Committee when dealing with provisions of the Aarhus Convention.[196]

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[185] Decision I/7, *supra* note 184, annex, section I, paras. 1 and 2; the Compliance Committee may examine compliance issues, make recommendations and prepare reports (section III of decision I/7).

[186] Decision I/7, ibid., section XI, para. 36.

[187] Decision I/7, ibid., section XII, para. 37.

[188] Decision I/7, ibid., section X, para. 35.

[189] Decision I/7, ibid., section XII, para. 37.

[190] Decision I/7, ibid., sections XI and XII, para. 37.

[191] Koester, *supra* note 184, p. 204; Report on the Fifth Meeting of the Compliance Committee, (MP.PP/C.1/2004/6, paras. 42 and 43), available at http://www.unece.org/fileadmin/DAM/env/documents/2004/pp/mp.pp/c.1/mp.pp.c.1.2004.6.e.pdf (accessed 3 March 2016).

[192] Koester, *supra* note 184, p. 204.

[193] Term used by Andrusevych/Alge/Konrad, *supra* note 47.

[194] *Walton v. The Scottish Ministers (Scotland)* [2012] UKSC 44, para. 100 (Lord Carnwath).

[195] *The Secretary of State for Communities and Local Government v. Venn* [2014] EWCA Civ 1539, para. 13.

[196] C-401/12 P ("Reference should also be made to the position adopted by the Aarhus Convention Compliance Committee."); C-72/12 P ("The Convention's Compliance Committee also regards the exclusion of environmental-law claims from actionable claims on the ground that actions relating to the rights of neighbours were restricted to subjective rights and the exclusion of environmental law from actions relating to the rights of neighbours as an infringement of article 9 (2). Even though that finding is not binding on the Court, it nevertheless supports my interpretation of the Convention.") See also Andrusevych/Alge/Konrad, *supra* note 47, pp. 138, 146, 148.

(d) International Narcotics Control Board

90. The International Narcotics Control Board is the monitoring body for the implementation of several international drug control treaties. According to article 9 of the Single Convention on Narcotic Drugs of 1961,[197] the Board has 13 members who have medical, pharmacological or pharmaceutical experience serving in their personal capacity.[198] The Board has been described as "an early example of the 'independent committee of experts' model that has been adopted and developed within the UN human rights system" whose similarities "far outweigh" the differences.[199]

91. The International Narcotics Control Board can take measures to ensure the execution of provisions of the Convention and call the attention of the parties, the Economic and Social Council of the United Nations and the Commission on Narcotic Drugs of the Council to impose sanctions if a State party has failed its obligations.[200] In its annual reports, the Board analyses the world situation in regard to drugs and gives recommendations.[201] The Board also considers in its reports whether States parties followed its previous recommendations.

92. States are not legally bound to follow the International Narcotics Control Board's interpretation of the conventions. A number of States have disagreed, for example, with the proposals of the Board regarding the establishment of so-called safe injection rooms and other harm reduction measures, [202] criticizing the Board for following too rigid an interpretation of the drug conventions and as acting beyond its mandate.[203]

(e) Conclusion regarding other expert bodies

93. In sum, the pronouncements of the Commission on the Limits of the Continental Shelf, the Compliance Committee under the Kyoto Protocol, the Compliance Committee under the Aarhus Convention and the International Narcotics Control

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[197] The International Narcotics Control Board was established under the Single Convention on Narcotic Drugs of 1961, *supra* note 37. The 1971 Convention on Psychotropic Substances (1019 UNTS 175) and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1582 UNTS 95) transfer further competencies to the Board; see generally S. Klinger, *Die Implementationssicherungsmechanismen der UN-Drogenkonventionen von 1961, 1971 und 1988*, Berlin 1999, p. 137.

[198] J. Csete and D. Wolfe, "Closed to Reason: The International Narcotics Control Board and HIV/AIDS", Canadian HIV/AIDS Legal Network/International Harm Reduction Development (2007), p. 3, criticize that "none of the Board's 13 members has formal training in international law, despite the importance of such credentials in interpreting treaty provisions".

[199] D. Barrett, *Unique in International Relations? A Comparison of the International Narcotics Control Board and the UN Human Rights Treaty Bodies (International Harm Reduction Association London 2006)*, pp. 5, 12-13.

[200] Article 14 of the Single Convention on Narcotic Drugs, article 19 of the Convention on Psychotropic Substances and article 22 of the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

[201] The requirement to issue annual reports on its work arises from article 15 of the Single Convention on Narcotic Drugs, article 18 of the Convention on Psychotropic Substances and article 23 of the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

[202] Report of the International Narcotics Control Board for 2009 (E/INCB/2009/1), para. 278; see also Csete and Wolfe, *supra* note 198, pp. 12-18.

[203] Barrett, *supra* note 199, p. 9.

Board, as examples of relatively strong expert bodies that are not established under human rights treaties, are primarily designed to facilitate the agreement of the parties regarding the application of the treaty rather than playing a role in the interpretation of the treaty.

6. Proposed draft conclusion 12

94. The following draft conclusion is proposed:

Draft conclusion 12
Pronouncements of expert bodies

(1) For the purposes of these draft conclusions, an expert body is a body, consisting of experts serving in their individual capacity, which is established under a treaty for the purpose of contributing to its proper application. The term does not include organs of an international organization.

(2) Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be reflected in, pronouncements of an expert body.

(3) A pronouncement of an expert body, in the application of the treaty under its mandate, may contribute to the interpretation of that treaty when applying articles 31, paragraph 1, and 32.

(4) Silence on the part of a State party shall not be assumed to constitute its acceptance of an interpretation of a treaty as it is expressed by a pronouncement of an expert body or by the practice of other parties in reaction to such a pronouncement.

(5) Paragraphs (1) to (4) apply without prejudice to any relevant rules of the treaty.

III. Decisions of domestic courts

95. One reason for the International Law Commission to address the present topic is that subsequent agreements and subsequent practice as a means of interpretation of treaties have implications at the domestic level.[204] When it adopted draft conclusion 4, the Commission said that subsequent practice under article 31 (3) (b), as "conduct in the application of the treaty", may also include judgements of domestic courts.[205] The Commission also concluded that other subsequent practice under article 32 may take the form of a judicial pronouncement.[206]

96. There are therefore two reasons why decisions of domestic courts are relevant in the present context: (a) such decisions themselves may be a form of subsequent practice in the application of the treaty; and (b) domestic courts should properly assess subsequent agreements and subsequent practice when they are called to

[204] *International Law Commission, Report of the Sixtieth session (2008), supra* note 2, p. 155, at para. 17 (annex I).
[205] *International Law Commission, Report of the Sixty-fifth session (2013), supra* note 3, Chapter IV, pp. 35-36, para. 17.
[206] Ibid., p. 41, para. 36.

interpret and apply a treaty. As forms of subsequent practice under articles 31 and 32, decisions of domestic courts do not raise specific problems. Since, however, it is one of the purposes of the present work to provide guidance to domestic courts regarding the way in which treaties are properly interpreted and applied,[207] it may be helpful to review the way in which domestic courts have approached subsequent agreements and subsequent practice as means of interpretation and to assess whether practice is in line with the draft conclusions that the Commission has so far provisionally adopted. Such a review will provide a basis for a draft conclusion whose purpose is to direct the attention of domestic courts to certain questions which have arisen in that context.

97. It would be impossible to review all published decisions of domestic courts in which a treaty was, or should have been, interpreted by taking into account a subsequent agreement under article 31 (3) (a) or subsequent practice under articles 31 (3) (b) or 32. The following review, although necessarily incomplete, benefits from a research project on the question of how domestic courts in a number of States have treated subsequent agreements and subsequent practice as a means of treaty interpretation.[208]

1. Constraints under domestic law

98. In most States, courts may apply treaties only within the framework of domestic law. Domestic law may therefore exclude the direct application of treaties or it may formulate certain constraints for such application.[209] Those constraints can affect the way in which treaties are interpreted, including the way in which subsequent agreements or subsequent practice under articles 31 (3) (a) and (b) and under article 32 are taken into account in the process of interpretation. The Federal Fiscal Court of Germany has stated, for example, that even if a subsequent agreement under article 31 (3) (a) were binding, domestic constitutional law would prevent that effect in domestic law.[210] The Court has argued, in particular, that a subsequent agreement under article 31 (3) (a) may not go so far as to override the law by which parliament has ratified the treaty and that this excluded an interpretation which would lead to an informal amendment of the treaty.[211] The German Federal Constitutional Court, on the other hand, has confirmed that the German Constitution accepts the "possibility under international law to (implicitly) modify the content or at least the interpretation of a treaty with respect to certain specific points by the practice of its application with the agreement of the other

[207] On the interpretation of treaties by domestic courts generally see the contributions in H.P. Aust and G. Nolte eds., "The Interpretation of International Law by Domestic Courts – Uniformity, Diversity, Convergence", (Oxford: Oxford University Press 2016).

[208] Katharina Berner, *Subsequent Agreements and Subsequent Practice in Domestic Courts*, doctoral thesis (Humboldt University Berlin 2015), not yet published; this research has found pertinent decisions from Australia, Austria, Belgium, Canada, Germany, Hong Kong (People's Republic of China), India, New Zealand, Switzerland, the United Kingdom, and the United States. The limitation of the study to those jurisdictions is due to reasons that include practice, availability and language. Spain, for example, in its response to the request of the Commission for information, has stated that no recent example could be found in the practice of its courts.

[209] M. Forteau, "The Role of International Rules of Interpretation for the Determination of Direct Effect of International Agreements", in Aust/Nolte, *supra* note 207, pp. 96-112.

[210] Germany, Federal Fiscal Court, BFHE vol. 181, p. 158, at p. 161; vol. 219, p. 518, at pp. 527-528.

[211] Ibid., BFHE vol. 157, p. 39, at pp. 43-44; vol. 227, p. 419, at p. 426.

parties (see articles 31 (3) (b), 39 VCLT)".[212] That jurisprudence is based on the assumption that the distinction between a permissible interpretation and an informal amendment is relevant under both the domestic constitution and international law, and that the distinction can be drawn by clarifying whether the parties, by the respective practice, intended to interpret or to amend the treaty.[213]

2. Classification

99. Domestic courts have sometimes explicitly recognized that subsequent agreements and subsequent practice under article 31 (3) (a) and (b) are "authentic" means of interpretation.[214] They have, however, not always been certain about the legal consequences which that characterization entails. Whereas some courts have assumed that subsequent agreements and practice by the parties under the treaty may produce certain binding effects,[215] others have rightly emphasized that article 31 (3) requires only that subsequent agreements and subsequent practice "be taken into account".[216]

100. Decisions of domestic courts have not been uniform with regard to the relative weight that subsequent agreements and subsequent practice possess in the process of interpretation of a treaty. Whereas some decisions have clearly treated subsequent conduct under article 31 as a primary means of interpretation,[217] other decisions appear to have subordinated subsequent agreements and subsequent practice to other means of interpretation mentioned in article 31, in particular to textual interpretation.[218] The divergence may, however, be more apparent than real, because the same courts have pursued a different style of reasoning in different cases. Article 31 does not, after all, require that all means of interpretation must in each

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[212] Decision of 15 December 2015 (not yet published), 2 BvL 1/12, at para. 90 "völkerrechtlich vorgesehene Möglichkeit, den Inhalt oder zumindest die Auslegung eines Abkommens durch die Praxis seiner Anwendung in Übereinstimmung mit der anderen Vertragspartei in ganz bestimmten Punkten (konkludent) zu ändern (vgl. Art. 31 Abs. 3 Buchstabe b, Art. 39 WVRK)".

[213] Germany, Federal Constitutional Court: BVerfGE vol. 90, p. 286, at pp. 359-363; vol. 104, p. 151, at p. 201.

[214] Switzerland, Federal Court: Judgment of 8 April 2004, 4C.140/2003, BGE vol. 130 III, p. 430, at p. 439 (where the Court speaks of the parties as being "masters of the treaty" ("Herren der Verträge"); Federal Court: Judgment of 12 September 2012, 2C_743/2011, BGE vol. 138 II p. 524, at pp. 527-528; Germany, Federal Constitutional Court, BVerfGE vol. 90, p. 286, at p. 362; see also India, Supreme Court: *Godhra Electricity Co Ltd. v. The State of Gujarat* [1975] AIR 32, at http://indiankanoon.org/doc/737188/ (accessed 3 March 2016).

[215] Germany, Federal Fiscal Court, BFHE vol. 215, p. 237, at p. 241; vol. 181, p. 158, at p. 161.

[216] New Zealand, Court of Appeals: *Attorney-General v. Zaoui (No. 2)*, [2005] 1 NZLR 690 [130]; Hong Kong, Court of Final Appeals: *Ng Ka Ling v. Director of Immigration* [1999] 1 HKLRD 315, 354; Austria, Higher Administrative Court: VwGH, Judgment of 30 March 2006, 2002/15/0098, 2, 5.

[217] United Kingdom, House of Lords: *R (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18, paras. 47-48 (Lord Steyn); United States, Supreme Court: *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, pp. 183-185; *O'Connor v. United States*, 479 U.S. 27, pp. 31-32; Switzerland, Federal Administrative Court: Judgment of 21 January 2010, BVGE 2010/7, para. 3.7.11; Switzerland, Federal Court: Judgment of 8 April 2004, 4C.140/2003, BGE vol. 130 III 430, 439.

[218] United Kingdom, House of Lords: *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, para. 31 (Lord Steyn); In the United States Supreme Court, Justice Scalia criticized the majority of the Court for relying on "[t]he practice of the treaty signatories" which, according to him, need not be consulted when the "Treaty's language resolves the issue presented, there is no necessity of looking further", *United States v. Stuart* 489 U.S. 353, p. 371.

case be given the same predetermined weight.[219] Rather, the provision leaves room for putting more or less emphasis on certain of those means, as appropriate.

3. Range of possible interpretations

101. The identification of subsequent practice under articles 31 (3) (b) and 32 has sometimes led domestic courts to arrive at a broad interpretation, and sometimes at a narrow interpretation. On the one hand, for example, the House of Lords of the United Kingdom interpreted the term "damage" under article 26 (2) of the Warsaw Convention as also including "loss", invoking the subsequent conduct of the parties.[220] On the other hand, the Supreme Court of the United States, having regard to the subsequent practice of the parties, decided that the term "accident" in article 17 of the Warsaw Convention should be interpreted narrowly in the sense that it excluded events that were not caused by an unexpected or unusual event but exclusively by the passenger's state of health.[221] Another example of a restrictive interpretation is a decision in which the Federal Court of Australia interpreted the term "impairment of dignity" under article 22 of the Vienna Convention on Diplomatic Relations as only requiring the receiving State to protect against breaches of the peace or the disruption of essential functions of embassies, and not against any forms of nuisance or insult.[222]

102. In a similar manner, subsequent practice under articles 31 (3) (b) and 32 has contributed to domestic courts arriving at both a more evolutive and a more static interpretation of a treaty. For example, in a case concerning the Convention on the Civil Aspects of International Child Abduction,[223] the Court of Appeal of New Zealand interpreted the term "custody rights" as encompassing not only legal rights but also "de facto rights". On the basis of a review of legislative and judicial practice in different States and referring to article 31 (3) (b), the Court reasoned that this practice "evidence[d] a fundamental change in attitudes" which led it to a modern understanding of the term "custody rights" rather than an understanding "through a 1980 lens".[224] The German Federal Constitutional Court, in a series of cases concerning the interpretation of the treaty establishing the North Atlantic

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[219] *International Law Commission, Report of the Sixty-fifth session (2013)*, *supra* note 3, Chapter IV, pp. 18-19, para. 15.

[220] United Kingdom, House of Lords: *Fothergill v. Monarch Airlines* [1980] UKHL 6, 278 (Lord Wilberforce) and 279 (Lord Diplock); similarly: Germany, Federal Court (Civil Matters): BGHZ vol. 84, p. 339, at pp. 343-344.

[221] United States, Supreme Court: *Air France v. Saks*, 470 U.S. 392, pp. 403-404.

[222] Australia, Federal Court of Australia: *Commissioner of the Australian Federal Police and the Commonwealth of Australia v. Magno and Almeida* [1992] FCA 566, paras. 30-35 (Einfeld J.); see also United Kingdom, House of Lords: *R (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18, paras. 47-48 (Lord Steyn).

[223] 1343 UNTS 89.

[224] New Zealand, New Zealand Court of Appeal: *C v. H* [2009] NZCA 100, paras. 175-177 and 195-196 (Baragwanath J.); see also para. 31 (Chambers J.): "Revision of the text as drafted and agreed in 1980 is simply impracticable, given that any revisions would have to be agreed among such a large body of Contracting States. Therefore, evolutions necessary to keep pace with social and other trends must be achieved by evolutions in interpretation and construction. This is a permissible exercise given the terms of the Vienna Convention on the Law of Treaties, which also came in force in 1980. Article 31 (3) (b) permits a construction that reflects 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'"; similarly: Canada, Supreme Court: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, para. 129 (Cory J.).

Treaty Organization in the light of the changed security context after the end of the Cold War, also held that subsequent agreements and subsequent practice under article 31 (3) (b) "could acquire significance for the meaning of the treaty" and ultimately held that this had been the case.[225]

103. Other decisions of domestic courts confirm that subsequent agreements and subsequent practice under articles 31 (3) and 32 do not necessarily support evolutive interpretations of a treaty. In *Eastern Airlines, Inc. v. Floyd*, for example, the Supreme Court of the United States was confronted with the question of whether the term "bodily injury" in article 17 of the Warsaw Convention of 1929 covered not only physical but also purely mental injuries. The court, taking account of the "post-1929 conduct" and "interpretations of the signatories", emphasized that, despite some initiatives to the contrary, most parties had always understood the term to cover only bodily injuries.[226]

4. Distinction between articles 31 (3) and 32 and the relevance of agreement between the parties

104. It is a more serious concern that domestic courts often do not distinguish clearly between subsequent agreements and subsequent practice under article 31 (3) (which requires agreement between the parties regarding the interpretation of a treaty), and other subsequent practice under article 32 (which does not require such agreement). The lack of distinction is not relevant when it only concerns the order in which a court considers different means of interpretation.[227] It does matter, however, when courts invoke article 31 (3) (b) without ascertaining whether the parties are actually in agreement regarding a particular interpretation.

105. That situation has occurred mainly in two types of cases: first, in cases in which courts have invoked article 31 (3) but have only referred to the practice of a limited number of parties to the treaty and thereby disregarded the requirement that such practice must establish the agreement of the parties;[228] and second, in cases in which domestic courts have simply assumed that the other parties have agreed, implicitly or by way of silence, to the practice of a limited number of parties, without providing any particular evidence or reason for that conclusion.[229]

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[225] Germany, Federal Constitutional Court: BVerfGE vol. 90, p. 286, at pp. 363-364, para. 276; vol. 104, p. 151, pp. 206-207.

[226] United States, Supreme Court: 499 U.S. 530, pp. 547-9; see also United Kingdom, House of Lords: *King v. Bristow Helicopters Ltd. (Scotland)* [2002] UKHL 7, paras. 98 and 125 (Lord Hope).

[227] See, e.g., United States, Supreme Court: *O'Connor v. United States* 479 U.S. 27, pp. 31-33.

[228] United Kingdom, House of Lords: *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, paras. 54-55 and 66-85 (Lord Mance); *R (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18, para. 47 (Lord Steyn); *King v. Bristow Helicopters Ltd. (Scotland)* [2002] UKHL 7, para. 80 (Lord Hope); New Zealand, Court of Appeal: *Attorney-General v. Zaoui and Others (No. 2)*, [2005] 1 NZLR 690, para. 130 (Glazebrook J.); *Lena-Jane Punter v. Secretary for Justice, ex p Adam Punter* [2004] 2 NZLR 28, para. 61 (Glazebrook J.); Germany, Federal Administrative Court: BVerwGE vol. 104, p. 254, at pp. 256-257.

[229] United Kingdom, House of Lords: *R (Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58, para. 38; Germany, Federal Administrative Court: Judgment of 29 November 1988, 1 C 75/86, [1988] *Neue Zeitschrift für Verwaltungsrecht*, p. 765, at p. 766.

106. In contrast, other court decisions have appropriately recognized that a particular subsequent practice did not establish an agreement between the parties,[230] or the courts have decided in conformity with the rule expressed in draft conclusion 9 (2) according to which silence on the part of a party to a treaty can only be taken to mean acceptance "if the circumstances call for some reaction".[231] Such circumstances have sometimes been recognized in specific cooperative contexts, for example under a bilateral treaty that provided for a particularly close form of cooperation.[232] This may be different if the form of cooperation envisaged by the treaty comes within the ambit of an international organization whose rules exclude that the practice of the parties, and their silence, are relevant for the purpose of interpretation.[233]

5. Use of subsequent practice which is not accompanied by an agreement of the parties

107. The fact that domestic courts have sometimes applied article 31 (3) (b) without ascertaining whether a particular subsequent practice established the agreement of parties regarding the interpretation of the treaty does not mean, however, that a use of such practice for the purpose of interpretation is impermissible or not to be encouraged. As Glazebrook J. of the Court of Appeal of New Zealand remarked, it is admissible to take decisions by the domestic court of another State into account because "the Vienna Convention also permits supplementary means of interpretation to be used under art 32 such as decisions from other jurisdictions".[234]

108. Many domestic courts have used decisions from other domestic jurisdictions without explicitly basing that use on article 32[235] and therefore engage in a "judicial dialogue" even if no agreement of the parties can be established thereby. Apart from possibly confirming an interpretation under article 32, such engagement may add to the development of a subsequent practice together with other domestic courts.[236] However, a selective invocation of certain practice, executive or judicial, that either disregards significant countervailing practice or otherwise cannot claim to be representative, should not be given much weight and may provoke legitimate

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[230] Australia, High Court: *Minister for Immigration v. Ibrahim* [2000] HCA 55, para. 140 (Gummow, J.); Germany, Federal Administrative Court: Decision of 7 February 2008, 10 C 33/07, para. 35 at http://lexetius.com/2008,925 (accessed 3 March 2016) which, however, concerned a case in which the available practice was not uniform.

[231] Switzerland, Federal Court: Judgment of 17 February 1971, BGE vol. 97 I, p. 359, at pp. 370-371.

[232] See United States, Supreme Court: *O'Connor v. United States*, 479 U.S. 27, pp. 33-35; Germany, Federal Constitutional Court: BVerfGE vol. 59, p. 63, pp. 94-95.

[233] See United Kingdom, Supreme Court: on the one hand *Assange v. The Swedish Prosecution Authority* [2012] UKSC 22, paras. 68-71 (Lord Phillips); and *Bucnys v. Ministry of Justice, Lithuania* [2013] UKSC 71, paras. 39-43 (Lord Mance), on the other.

[234] New Zealand, Court of Appeal: *Ye v. Minister of Immigration* [2009] 2 NZLR 596, at para. 71.

[235] See, e.g., United States, Supreme Court: *Air France v. Saks*, 470 U.S. 392, pp. 397-407; *Abbott v. Abbott* 560 U.S. ___ (2010), Opinion (Kennedy J.), Slip Opinion at http://www.supremecourt.gov/opinions/09pdf/08-645.pdf (accessed 3 March 2016), at pp. 12-16; Germany, Federal Administrative Court: BVerwGE vol. 139, p. 272, at pp. 288-289; High Court of Australia: *Macoun v. Commissioner of Taxation* [2015] HCA 44, at pp. 75-82.

[236] A. Tzanakopulos, "Judicial Dialogue as a Means of Interpretation", in Aust/Nolte, *supra* note 207, p. 72, at p. 94; E. Benvenisti, "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts", 102 (2008) *American Journal of International Law*, at pp. 241-274.

criticism.[237] The line between an appropriate use and a selective invocation of decisions of other domestic courts may be thin. Lord Hope of the House of Lords, quoting the Vienna rules of interpretation, provided a reasonable general orientation when he stated:

> In an ideal world the Convention should be accorded the same meaning by all who are party to it. So case law provides a further potential source of evidence. Careful consideration needs to be given to the reasoning of courts of other jurisdictions which have been called upon to deal with the point at issue, particularly those which are of high standing. Considerable weight should be given to an interpretation which has received general acceptance in other jurisdictions. On the other hand, a discriminating approach is required if the decisions conflict, or if there is no clear agreement between them.[238]

109. Much depends on how that general orientation is applied. For example, it is not appropriate, as a general rule, to selectively invoke the decisions of one particular national jurisdiction or the practice of a particular group of States, as important as they may be.[239] On the other hand it may be appropriate, in a case in which the practice in different domestic jurisdictions diverges, to emphasize the practice of a more representative group of jurisdictions[240] and to give more weight to the decisions of higher courts.[241]

6. Identification of subsequent agreements and subsequent practice

110. Not surprisingly, domestic courts have more frequently identified subsequent agreements under article 31 (3) (a) between two or very few parties rather than between the parties of open multilateral treaties.[242] In that context, domestic courts

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[237] United Kingdom, Supreme Court: *R (Adams) v. Secretary of State for Justice* [2011] UKSC 18, para. 17 (Lord Philips) ("This practice on the part of only one of the many signatories to the ICCPR does not provide a guide to the meaning of article 14 (6) ... It has not been suggested that there is any consistency of practice on the part of the signatories that assists in determining the meaning of article 14 (6).").

[238] United Kingdom, House of Lords: *King v. Bristow Helicopters Ltd. (Scotland)* [2002] UKHL 7, at para. 81.

[239] See, e.g., United Kingdom, House of Lords: *King v. Bristow Helicopters Ltd.*, ibid., at para. 7 (Lord Mackay): "Because I consider it important that the Warsaw Convention should have a common construction in all jurisdictions that have adopted the Convention, I attach crucial importance to the decisions of the United States Supreme Court in *Eastern Airlines Inc. v. Floyd* (1991) 499 US 530 and *El Al Israel Airlines v. Tseng*, particularly as the United States is such a large participant in carriage by air."; or Einfeld J. for the Federal Court of Australia in *Commissioner of the Australian Federal Police and the Commonwealth of Australia v. Magno and Almeida* [1992] FCA 566, para. 30, in a case concerning the interpretation of the term "impairment of dignity" of a diplomatic representation under article 22 of the Vienna Convention on Diplomatic Relations, recalling article 31 (3) (b), who stated that "the international application of the Convention by democratic countries indicates that another significant consideration is freedom of speech in the host country. This factor is particularly weighty when dealing with political demonstrations outside embassies. It is useful to consider the practice of countries with considerable experience in dealing with this type of situation, such as the United States and the United Kingdom".

[240] Canada, Supreme Court: *Yugraneft Corp. v. Rexx Management Corp.* [2010] 1 SCR 649, para. 21 (Rothstein, J.).

[241] United Kingdom, House of Lords: *Sidhu v. British Airways* [1997] AC 430, at para. 453 (Lord Hope); *Fothergill v. Monarch Airlines Ltd.* [1980] UKHL 6, para. 275-276 (Lord Wilberforce).

[242] Berner, *supra* note 208, chapter 6.

have not always carefully identified the evidence before concluding that the parties had subsequently agreed on a particular interpretation. For example, in *Diatlov v. Minister for Immigration and Multicultural Affairs*[243] the Federal Court of Australia stated that "it seems clear enough that the Stateless Persons Convention forms part of the context for the purpose of construing the Refugees Convention: see Vienna Convention, article 31 (3) (a), (c)". In order to draw the conclusion that the Convention relating to the Status of Stateless Persons constituted a subsequent agreement regarding the Convention relating to the Status of Refugees under article 31 (3) (a), the court should have rather determined whether the Stateless Persons Convention encompasses all parties to the Refugees Convention (which it does not), and whether the Stateless Persons Convention could be seen as having been concluded "regarding the interpretation" of the Refugees Convention.

111. The Hong Kong Court of Final Appeal provided an example for a more rigorous approach when it was called to interpret the Sino-British Joint Declaration in the case of *Ng Ka Ling v. Director of Immigration*.[244] In that case, one party alleged that the Sino-British Joint Liaison Group, consisting of representatives of China and the United Kingdom under article 5 of the Joint Declaration, had come to an agreement regarding the interpretation of the Joint Declaration by pointing to a booklet which stated that it was compiled "on the basis of the existing immigration regulations and practices and the common view of the British and Chinese sides in the [Joint Liaison Group]". The Court, however, did not find it established that the purpose of the booklet was to "interpret or to apply" the Joint Declaration within the meaning of article 31 (3) (a).[245]

7. Proposed draft conclusion 13

112. The following draft conclusion is proposed:

Draft conclusion 13
Decisions of domestic courts

(1) Decisions of domestic courts in the application of a treaty may constitute relevant subsequent practice under articles 31 (3) (b) and 32 for the interpretation of the treaty.

(2) Domestic courts, when applying a treaty, should

(a) consider that subsequent agreements and subsequent practice under article 31 (3) (a) and (b) are not binding as such.

(b) be aware that subsequent agreements and subsequent practice under article 31 (3) (a) and (b) and other subsequent practice under article 32 may support a narrow or a wide interpretation of the meaning of a term of a treaty, including one that is constant or is evolving over time.

(c) distinguish between subsequent agreements and subsequent practice under article 31 (3) (a) and (b), which require the agreement of the parties, and other subsequent practice under article 32, which does not.

[243] [1999] FCA 468, para. 28.
[244] [1999] 1 HKLRD 315.
[245] Ibid. at paras. 152 and 153.

(d) carefully identify whether a subsequent practice in the application of a treaty establishes agreement of the parties regarding an interpretation of the treaty, and in particular whether silence on the part of one or more parties actually constitutes their acceptance of the subsequent practice.

(e) attempt to identify a broad and representative range of subsequent practice, including decisions of domestic courts, when considering subsequent practice as a means of interpreting a treaty.

IV. Structure and scope of the draft conclusions

113. As the work on the present topic is advancing to the stage of first reading it is necessary to consider some aspects that concern the proposed set of draft conclusions as a whole. The Special Rapporteur proposes to give the following general structure to the set of draft conclusions:

I. Introduction (with a new introductory draft conclusion 1a)

II. Basic rules and definitions (provisionally adopted draft conclusions 1, 2, 4, 5)

III. Subsequent agreements and subsequent practice in the process of interpretation (provisionally adopted draft conclusions 3, 6, 7, 8, 9)

IV. Specific forms and aspects of subsequent agreements and subsequent practice (provisionally adopted draft conclusions 10, 11, 12, 13)

V. Final clause (with a new final draft conclusion 14)

114. After its consideration of the present report, the Commission will have dealt with those aspects of the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" that the Special Rapporteur originally proposed should be covered.[246] While it is possible that there remain certain aspects that have not been addressed, explicitly or implicitly, the cross-cutting and diverse nature of the present topic does not require that every possible aspect be addressed.

115. One aspect of the topic that has not been addressed is the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations or between international organizations. The Special Rapporteur proposes that that aspect should be dealt with separately, if necessary, as the Commission did in its previous work on the law of treaties. In addition, the Special Rapporteur does not consider it necessary that subsequent agreements and subsequent practice regarding treaties that are "adopted within an international organization" in the sense of article 5 of the Vienna Convention on the Law of Treaties be addressed specifically.[247] There do not seem to be relevant general

[246] A/67/10, p. 124, para. 237-239.

[247] See El Salvador (A/C.6/70/SR.22, para. 107) and Malaysia (A/C.6/70/SR.23, para. 50).

distinctions, at least as far as their interpretation is concerned, between such treaties and those that are adopted at a diplomatic conference.[248]

116. The commentary to a new introductory draft conclusion will accordingly make it clear that the draft conclusions as a whole do not deal with all circumstances in which subsequent agreements and subsequent practice may be taken into account in the interpretation of treaties.

117. The following draft conclusion is proposed:

New draft conclusion 1a
Introduction

The present draft conclusions concern the significance of subsequent agreements and subsequent practice for the interpretation of treaties.

V. Revision of draft conclusion 4 (3)

118. The advanced stage of the work on the topic within the Commission also gives occasion to reconsider a previously adopted draft conclusion in the light of later developments. In that context, the Special Rapporteur proposes, as do two States,[249] to revisit provisionally adopted draft conclusion 4 (3), according to which "other subsequent practice consists of conduct by one or more parties in the application of the treaty, after its conclusion". As described above,[250] the Commission later adopted draft conclusion 11 (3), according to which: "Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32."[251] In its commentary to draft conclusion 11 (3), the Commission noted:

> The Commission may revisit the definition of "other subsequent practice" in draft conclusions 1 (4) and 4 (3) in order to clarify whether the practice of an international organization as such should be classified within this category which, so far, is limited to the practice of Parties.[252]

119. The Special Rapporteur proposes in the present report that the pronouncements of expert bodies under human rights treaties, while not constituting practice of a party in the application of the treaty, are nevertheless official pronouncements whose purpose under the treaty it is to contribute to its proper application. Pronouncements of expert bodies are "in the application of the treaty", since such "application", according to the Commission:

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[248] H. Anderson, Introduction, in O. Corten and P. Klein, eds., *The Vienna Convention on the Law of Treaties – A Commentary* (Oxford: Oxford University Press 2011), p. 94, para. 19.; C. Brölman, "Specialized Rules of Treaty Interpretation: International Organizations", in D. Hollis, ed., *The Oxford Guide to Treaties* (Oxford: Oxford University Press 2012), pp. 507-524; and Gardiner, *supra* note 93, pp. 126-127 do not address "treaties adopted within an international organization"; see also K. Schmalenbach, article 5, in O. Dörr and K. Schmalenbach, eds., *Vienna Convention on the Law of Treaties – A Commentary* (Springer 2012), pp. 93-95, at paras. 10-13.

[249] See *supra* note 17 (Austria and Malaysia).

[250] *Supra* paras. 58-62.

[251] Draft conclusion 11(3), *International Law Commission, Report of the Sixty-seventh session (2015)*, *supra* note 7, Chapter VII, p. 89, para. 128.

[252] Ibid., p. 100, footnote 354 referring to *International Law Commission, Report of the Sixty-fifth session (2013)*, *supra* note 3, Chapter IV, pp. 11-12.

> Includes not only official acts at the international or at the internal level which serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, inter alia, official statements regarding its interpretation.[253]

120. Pronouncements by expert bodies fit as a "supplementary" means of interpretation, as envisaged in article 32. In contrast to subsequent practice of the parties under article 31 (3) (b), there is no strict obligation to take such supplementary means "into account". The fact that the pronouncements are envisaged by the treaty as an official means to contribute to its proper application is sufficient to consider them to be "other subsequent practice" under article 32. The Special Rapporteur therefore proposes to replace the words "by one or more parties" in draft conclusion 4 (3) with the word "official" and reformulate draft conclusion 4 (3) as follows:

> Other "subsequent practice" as a supplementary means of interpretation under article 32 consists of official conduct in the application of the treaty, after its conclusion.

It is not necessary to change the text of draft conclusion 1 (4), but only to make an appropriate reference in the commentary.

121. The commentary would then clarify that the term "official conduct" not only encompasses conduct by States parties to a treaty but also conduct by bodies which are established by the treaty and are mandated to contribute to its proper application.

122. The following revision to draft conclusion 4 is proposed:

> **Revised draft conclusion 4**
>
> (1) – (2) [remain unchanged]
>
> (3) Other "subsequent practice" as a supplementary means of interpretation under article 32 consists of official conduct in the application of the treaty, after its conclusion.

VI. Future programme of work

123. The present report seeks to complete the set of draft conclusions proposed by the Special Rapporteur. If the Commission is able to provisionally adopt the draft conclusions that are proposed in the present report, the full set of draft conclusions could be adopted on first reading at the end of the sixty-eighth session in 2016. The Commission would then have adopted, in the four years from 2013 to 2016, the full set of draft conclusions with commentaries. A second reading could be envisaged for 2018, which would give States, international organizations and other relevant actors enough time to prepare written observations to the set of draft conclusions and commentaries adopted on first reading. The Special Rapporteur is aware that the programme of work is ambitious, and he is prepared to adapt the pace of progress to the circumstances.

[253] Ibid., p. 35, para. 17.

Annex

Proposed draft conclusions

New draft conclusion 1a
Introduction

The present draft conclusions concern the significance of subsequent agreements and subsequent practice for the interpretation of treaties.

Proposed revised draft conclusion 4

(1) – (2) [remain unchanged]

(3) Other "subsequent practice" as a supplementary means of interpretation under article 32 consists of official conduct in the application of the treaty, after its conclusion.

Draft conclusion 12
Pronouncements of expert bodies

(1) For the purposes of these draft conclusions, an expert body is a body, consisting of experts serving in their individual capacity, which is established under a treaty for the purpose of contributing to its proper application. The term does not include organs of an international organization.

(2) Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be reflected in, pronouncements of an expert body.

(3) A pronouncement of an expert body, in the application of the treaty under its mandate, may contribute to the interpretation of that treaty when applying articles 31, paragraph 1, and 32.

(4) Silence on the part of a State party shall not be assumed to constitute its acceptance of an interpretation of a treaty as it is expressed by a pronouncement of an expert body or by the practice of other parties in reaction to such a pronouncement.

(5) Paragraphs (1) to (4) apply without prejudice to any relevant rules of the treaty.

Draft conclusion 13
Decisions of domestic courts

(1) Decisions of domestic courts in the application of a treaty may constitute relevant subsequent practice under articles 31 (3) (b) and 32 for the interpretation of the treaty.

(2) Domestic courts, when applying a treaty, should

(a) consider that subsequent agreements and subsequent practice under article 31 (3) (a) and (b) are not binding as such.

(b) be aware that subsequent agreements and subsequent practice under article 31 (3) (a) and (b) and other subsequent practice under article 32 may support a narrow or a wide interpretation of the meaning of a term of a treaty, including one that is constant or is evolving over time.

(c) distinguish between subsequent agreements and subsequent practice under article 31 (3) (a) and (b), which require the agreement of the parties, and other subsequent practice under article 32, which does not.

(d) carefully identify whether a subsequent practice in the application of a treaty establishes agreement of the parties regarding an interpretation of the treaty, and in particular whether silence on the part of one or more parties actually constitutes their acceptance of the subsequent practice.

(e) attempt to identify a broad and representative range of subsequent practice, including decisions of domestic courts, when considering subsequent practice as a means of interpreting a treaty.